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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

and

POLK TANKER CORPORATION,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Seatrain Shipbuilding Corporation and Polk Tanker Corporation pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered February 6, 1979, reversing the summary judgment granted petitioners by the United States District Court for the District of Columbia and remanding for the entry of an order granting respondents the relief requested.

OPINIONS BELOW

The opinion of the court of appeals is unreported and set forth in Appendix A at 1a-61a. The opinion of the district court is reported at 445 F. Supp. 1128 (D.D.C. 1978) and set forth in Appendix A at 65a-95a.

JURISDICTION

The Court of Appeals entered judgment on February 6, 1979 and denied a timely petition for rehearing on March 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the broad contracting authority of the Secretary of Commerce under the Merchant Marine Act, 1936, includes the power to amend a construction differential subsidy contract to remove domestic trade restrictions in consideration for full subsidy repayment, where the existence of such power is supported by the legislative and administrative history of the Act and furthers the Act's fundamental policy goals.

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101, *et seq.*, are set forth in Appendix B.

STATEMENT OF THE CASE

The T.T. STUYVESANT is a 225,000 deadweight ton oil tanker constructed by Seatrain Shipbuilding Corporation ("Seatrain") for Polk Tanker Corporation ("Polk") between 1972 and 1977. The vessel was constructed with the assistance of a $27.2 million construction differential subsidy ("CDS") from the federal government. In contracting for the CDS, Seatrain and Polk agreed to limit the vessel's operation in the domestic trades in accordance with Title V of the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101 *et seq.* ("the Act").

On August 31, 1977, the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board took a series of actions that enabled the STUYVESANT to engage in the transportation of Alaskan oil. Those actions included a decision to accept a full repayment of the $27.2 million CDS and, in exchange, to delete from the contract the domestic trade restrictions. The three respondent companies filed suit for declaratory and injunctive relief, contending *inter alia* that the Act does not authorize the removal of trade restrictions in consideration for subsidy repayment. The district court's decision that the Act empowered the federal officials to take the challenged actions was reversed by a divided panel of the court of appeals.

1. Statutory Framework

The Merchant Marine Act, 1936 was designed to "foster the development and encourage the maintenance" of an efficient U.S.-built, owned, manned and serviced merchant marine capable of meeting the nation's defensive and commercial needs in the do-

mestic and foreign trades. (Section 101 of the Act, 46 U.S.C. § 1101.) The Act vests in the Secretary of Commerce commensurate responsibility and authority to administer the nation's maritime functions; she is broadly charged to keep current on the entire industry and "to study all maritime problems arising in the carrying out of the policy set forth in Title I of the Act." (Sections 210-212 of the Act, 46 U.S.C. §§ 1120-1122.) The Secretary is empowered to "enter into such contracts . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the [Department of Commerce] to secure indebtedness . . . ." (Section 207 of the Act, 46 U.S.C. § 1117.)

The construction differential subsidy program, codified in Title V of the Act, 46 U.S.C. §§ 1151-1161, was designed to stimulate domestic shipbuilding and to increase the number of American-owned vessels. Although the requirements of the Jones Act, 46 U.S.C. § 883, assured that vessels operating in the U.S. domestic trades would be built here and owned by U.S. citizens, no similar provision governs ships operating in the U.S. foreign trades. Because the cost of building ships in this country is and has historically been higher than that of building them abroad, simple economics would dictate the use of foreign shipyards for ships intended for the foreign trades in the absence of some equalizer. Congress supplied that equalizer in Title V; the CDS program

authorizes the Secretary to subsidize the construction of vessels intended for the foreign trade by paying the approximate difference between the cost of domestic and foreign construction.

The Secretary of Commerce and her delegees (hereinafter "the Secretary") have full authority over the administration of the CDS program. Section 501, 46 U.S.C. § 1151, provides that CDS applications be submitted to the Secretary who is afforded broad discretion to determine subsidy eligibility. Sections 502 and 504, 46 U.S.C. §§ 1152 and 1154, provide the basic CDS contracting authority; that authority is expansive in accordance with the Act's multiple policy goals. Section 503, 46 U.S.C. §§ 1153, provides that CDS-built vessels shall be documented under the U.S. flag throughout their useful lives and § 505, 46 U.S.C. § 1555, requires that subsidized vessels be constructed in U.S. shipyards with domestic materials. Finally, as relevant to this proceeding, § 506, 46 U.S.C. § 1156, provides that owners of vessels for which CDS has been paid "shall agree" to limit the operation of their vessels to the foreign trade. Section 506 also provides that the Secretary may, when she determines it "necessary or appropriate to carry out the purposes of this Act," permit a CDS vessel to operate temporarily in the domestic trades for up to six months in any year in exchange for a partial, proportionate CDS repayment.

Title XI provides an additional method by which the federal government may assist the financing of

shipbuilding in the country. Obviating the need for a ship owner to use his own credit to raise construction capital, this title authorizes the agency to provide substantial loan guarantees to finance both initial construction costs of a vessel and a full or partial CDS repayment.

2. Statement of Facts

In 1969, Seatrain commenced construction of a series of supertankers at the shipbuilding facilities of the former Brooklyn Navy Yard. Seatrain's adaptation of those facilities and institution of a program to train and employ hard-core unemployeds from the Bedford-Stuyvesant section of Brooklyn attracted substantial economic assistance from the Economic Development Administration of the Department of Commerce ("EDA"), including loans of $5 million and 90% guarantees of $82 million in loans to Seatrain.

The third vessel in the construction program, the T.T. STUYVESANT, was constructed between 1972 and 1977. Its construction was initially assisted by loan guarantees of $30.2 million pursuant to Title XI of the Act and a $27.2 million construction differential subsidy paid pursuant to Title V of the Act. As required by § 506, the STUYVESANT's CDS contract contained terms restricting the vessel's operation in the domestic trade.

Trade conditions changed dramatically during the six years that the STUYVESANT was under construction. The 1973 Middle East conflict, the Arab oil embargo and ensuing worldwide economic problems converged to decrease drastically the demand for supertankers in the foreign trades. By 1977, the foreign tanker market that the STUYVESANT had been constructed to serve offered no prospect for its employment. However, at the same time, the domestic transportation of Alaskan oil—reserved to U.S.-built, owned and operated vessels by the Jones Act—was a thriving and undertonnaged tanker trade that sought the STUYVESANT's service. In mid-1977, Polk secured an attractive opportunity to charter the STUYVESANT for three years to Standard Oil Company of Ohio ("SOHIO") to carry oil between Alaska and Panama and, as a result of the charter, to sell the vessel. The charter and sale were premised upon the vessel's ability to obtain release from the domestic trade restrictions in its CDS contract.

On August 25, 1977, Polk applied for permission to repay the $27.2 million subsidy in exchange for the permanent release of domestic trade restrictions on the STUYVESANT. The Maritime Subsidy Board and the Assistant Secretary of Maritime Affairs approved Polk's request on August 30, 1977 on the grounds that the STUYVESANT had no other opportunity for employment, the approval of the CDS repayment and SOHIO charter would improve the government's collateral position and prevent default on the various obligations insured and guaranteed by the Department of Commerce, and the failure to

approve the proposal would jeopardize the continued operation of the Seatrain shipyard.

A closing of the various financial transactions surrounding the repayment, sale and charter of the STUYVESANT was scheduled for September 23, 1977. On September 22, 1977, the respondents filed suits against the Department of Commerce officials, seeking temporary and permanent injunctive relief from their decisions concerning the STUYVESANT.[1] Polk and Seatrain were permitted to intervene as defendants.

A temporary restraining order was granted and subsequently dissolved when the court denied preliminary injunctive relief. The transactions closed on September 30.[2] As a result of these transactions,

[1] Alaska Bulk Carriers, Inc. and Trinidad Corporation filed an action against the Secretary of Commerce Juanita M. Kreps, Assistant Secretary of Commerce Robert J. Blackwell, the Maritime Administration and the Maritime Subsidy Board. In addition to Secretary Kreps and Assistant Secretary Blackwell, Shell Oil Company sued Howard F. Casey, then Deputy Assistant Secretary of Commerce, and Samuel B. Nemirow, then General Counsel to the Maritime Administration.

[2] At that time, the STUYVESANT was transferred to United States Trust Company ("USTC") as owner-trustee for the new equity owner, General Electric Credit Corporation ("GECC"). The Secretary amended the STUYVESANT's CDS contract to delete the restrictions on the vessel's domestic trading, and Polk issued a fully collateralized promissory note to the Secretary for $27,200,000 in repayment of the full amount of the CDS. The note was assumed

(1) the Department of Commerce received a fully collateralized $27.2 million note and was released from $28 million of loan guarantees, (2) the STUYVESANT, which supports over $60 million of government-insured indebtedness, is profitably employed rather than standing idle in lay-up, and (3) a critical shortage of tonnage for the transportation of Alaskan oil was alleviated. The STUYVESANT has been transporting oil from Alaska to Panama for SOHIO since that time.

After cross motions for summary judgment were filed, the district court held that the Secretary's broad contractual powers under the Act include the authority to remove permanently trade restrictions on a CDS-built vessel in exchange for CDS repayment. The court rejected respondents' argument that § 506 implicitly bars the permanent removal of domestic trade restrictions and reasoned that an absolute prohibition of such action "precludes any and all administrative flexibility and thereby at least potentially obstructs

by USTC which also assumed responsibility for $60,200,000 of government-insured indebtedness on the vessel, $31,355,000 of which is indebtedness incurred at the closing through the sale of bonds. The proceeds received from the sale of the bonds were used to repay loans of $28,000,000 guaranteed by the EDA. USTC also paid Polk $32,600,000 in cash; these funds were placed in an interest-bearing certificate of deposit account and secure a guarantee to GECC provided by Seatrain Lines, Inc., the parent corporation of Seatrain and Polk. USTC then bareboat-chartered the vessel to Queensway Tankers which in turn time chartered it to SOHIO for three years.

the Secretary's ability to effectuate the broad statutory goals set forth [in Title I of the Act]." (App. A at 78a.) A divided panel of the court of appeals disagreed and reversed. Interpreting the Act to earmark permanently subsidized and unsubsidized vessels for "two completely separate competitive areas" (App. A at 50a), the panel majority concluded that the Secretary's action is unauthorized by the Act, implicitly prohibited by § 506, and contrary to the Act's overall purposes.

REASONS FOR GRANTING PETITION

This case presents an important issue of federal law in a unique posture. No court other than the lower courts in this case have ruled on the issue here. The four judges who have considered the case have split evenly on the fundamental question of the Secretary's statutory authority. Regardless of its merit, the disposition of the case by the court of appeals will prevent the Secretary from granting any permanent release of trade restrictions in the future. Thus there will never be another opportunity for this Court or any other court to review the issue presented by this case. The importance of the issue to the federal maritime program, the staggering economic consequences to the commercial transactions entered into on the basis of the Secretary's action, the panel majority's crabbed and erroneous interpretation of the Secretary's authority under the Act, and the blatant anti-competitive effect of the decision below combine to warrant review by this Court.

1. The decision of the court of appeals overturns a longstanding agency interpretation and carries serious adverse implications, both short and long term, for the Department of Commerce and the nation's maritime industry.

The immediate impact of the decision below is the disqualification of the STUYVESANT from long term, continuous employment in the nation's domestic trades. That disqualification threatens enormous financial loss to the United States treasury and the parties to the charter and sale transaction. It deprives the federal government of a $27 million subsidy repayment, jeopardizes $60 million of loans and guarantees extended by the Department of Commerce and secured by the STUYVESANT, threatens Seatrain Lines, Inc. with an obligation to perform on its $30 million guarantee to GECC, and potentially relegates a $100 million American-built, owned and crewed supertanker to lay-up and foreclosure.

The more general consequence of the decision is to cripple the Secretary's ability to oversee and permit deployment of the American fleet in the best interests of the industry and the public. It denies her the discretion and flexibility necessary to respond effectively to the exigencies of changing conditions and markets in the maritime world, and thus to effectuate the fundamental and explicit purposes of the Act. This result presents a windfall to the unsubsidized fleet by permanently insulating it from fair competition with vessels that once received but have remitted their

subsidy. The decision skews the Act to benefit one segment of the American merchant marine at the expense of the rest of the industry, and thus substantially undermines the balance of interests that Congress achieved in the Act itself.

2. In reversing the district court and declaring the Secretary's actions beyond her statutory authority, the panel majority concluded that the permanent removal of domestic trade restrictions on a CDS-built vessel is not authorized by any provision of the Act, is implicitly precluded by § 506, and is contrary to the overall purposes of the Act. The majority makes three basic mistakes: (a) the Act amply empowers the Secretary to take the action challenged here; (b) § 506 does not bar the permanent removal of trade restrictions; and (c) the action is fully supportive of and consistent with the congressional policy expressed both in the legislative history and the structure of the Act, including § 506 itself.

a. *The Secretary's Authority*

No provision of the Act authorizes *in haec verba* the Secretary to delete from a CDS contract the terms restricting domestic trading by a vessel constructed with CDS assistance in consideration for full CDS repayment. That omission, however, does not deny the Secretary the amendatory authority where such a power is included in the broader authority afforded by the Act. The decisions of the district court and the dissent below recognize that the expansive con-

tractual powers of the Secretary under the Act provide ample authority for the Secretary's decision concerning the STUYVESANT.

The Act entrusts to the Secretary the formidable obligation to effectuate the policy goals set forth in Title I. That title declares a national policy of bolstering domestic shipyards, and fortifying and increasing the number and competitive abilities of Jones Act vessels in both the domestic and foreign trades.

The discretionary powers afforded the Secretary under the Act are as broad as the duties imposed upon her. Section 207 flatly empowers the Secretary to "enter into such contracts, upon behalf of the United States, . . . as may, in [her] discretion, be necessary to carry on the activities authorized by [the] Act, or to protect, preserve or improve the collateral held by the [government] to secure indebtedness . . . ." (App. B at 99a.) Section 504 places within the Secretary's power the full authority to make CDS contracts (App. B at 122a), and this section has been interpreted, correctly we submit, in reorganization plans to include the related authority to amend and terminate such contracts.[3] (*See* App. B at 107a, 112a-113a.) The Secretary's CDS contracting authority is qualified only by the requirement of §§ 501(a) and 504 that CDS contracts "shall not restrict the lawful or proper

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[3] Reorganization Plan No. 21 of 1950, § 105(1), 64 Stat. 1273. *See also* Reorganization Plan No. 7 of 1961, § 202(b)(1), 75 Stat. 840.

use or operation of the vessel, except to the extent *expressly* required by law." (Emphasis added.) (App. B at 113a-114a, 122a.)

These contractual powers embrace the ability to amend a CDS contract to delete domestic trade restrictions in consideration for subsidy repayment, unless the existence of such authority is otherwise expressly denied by the Act or inconsistent with its overall purposes and policies. All opinions issued below agree that the Act contains no provision that expressly prohibits the permanent release of trade restrictions. The decision of the panel majority turned instead upon its erroneous reading of § 506 as an implicit bar to such authority and its misperception of the Act's fundamental purposes.

b. *Section 506 of the Act*

The panel majority concluded that § 506 implicitly prohibits the permanent removal of domestic trade restrictions on a CDS-built vessel. An examination of the provision, its legislative history, and administrative interpretation demonstrates the error of this conclusion.

Section 506 requires a vessel owner to agree to operate the vessel in the foreign trades as the *quid pro quo* for CDS payment. That agreement is not absolute. Rather § 506 expressly contemplates that a CDS vessel may spend six months of every year, and thus half its economic life, in direct competition with unsubsidized vessels in the domestic trades. The

opportunity for such temporary domestic trading is conditioned upon (1) the owner's remittance of a proportionate amount of its subsidy, and (2) the Secretary's determination that the temporary transfer is "necessary or appropriate to carry out the purposes of [the] Act." (App. B at 122a-123a.)

The language of § 506 establishes only the restrictions that attach to a vessel that has received and still retains the financial benefits of the subsidy. The provision does not address, and thus imposes no restriction on, the trading opportunities of a vessel that once received but has remitted in full a subsidy. The logic of the statutory provision does suggest, however, that any trade restrictions that attach as a condition of the subsidy's receipt should be removed in consideration for its full repayment, if the Secretary finds that such action would further the purposes of the Act.

An analysis of the Act's legislative history plainly establishes that result as the intention of the framers of the Act. Indeed, multiple bills proposed prior to the Act's passage,[4] statements in the relevant Con-

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[4] *See, e.g.*, H.R. 7521, 74th Cong., 1st Sess. § 504 (1935) (introduced by Judge Bland, Chairman of House Committee on Merchant Marine and Fisheries); S. 2582, 74th Cong., 1st Sess. § 504 (1935) (introduced by Senator Copeland, Chairman of Senate Commerce Committee); S. 4110, 74th Cong., 2d Sess. § 27 (introduced by Senator Guffey); S. 3500, 74th Cong., 2d Sess. § 506(b) (introduced by Senator Copeland as Committee Print of March 3, 1936).

gressional reports,[5] the comments of the Act's pioneers, including Senators Black, Copeland and Guffey,[6] and the original language of § 506[7] all expressly contemplated and approved the permanent release of the trade restrictions upon full subsidy repayment.

Although the panel majority grudgingly recognized the demonstrable intent of the enacting Congress, it concluded that a 1938 amendment to § 506[8] dispelled the authority to release permanently domestic trade restrictions. The incorrect observation rests exclusively on the unexplained deletion of the language describing the Secretary's permanent waiver authority during the course of the 1938 amendment and contradicts the legislative history and the contemporaneous industry understanding. The legislative history firmly

[5] *See* H.R. Rep. 1277, 74th Cong., 1st Sess. 22 (1935).

[6] *See, e.g.*, S. Rep. 898, 74th Cong., 1st Sess. 44 (1935); Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 124, 133 (1936).

[7] Section 506 as enacted in 1936 stated in relevant part: "It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in the foreign trade . . . . unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid . . . as the remaining economic life bears to its entire economic life." Act of June 24, 1936, c. 858, § 506, 49 Stat. 1999.

[8] Act of June 23, 1938, § 18, 52 Stat. 958.

establishes that the purpose of the 1938 amendment to § 506 was to clarify the requirement of a proportionate subsidy repayment in cases of temporary domestic trading by CDS vessels.[9] The dissent correctly notes that "nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938." (App. A at 55a.) Moreover, Congress specifically stated that the 1938 amendment effected "[n]o fundamental change in the original purpose of the section,"[10] a purpose that plainly included permanent trade restriction release. Finally, the legislative history demonstrates that the unsubsidized operators did not share the panel majority's view of the effect of the amendment. Indeed, their representatives testified against the amendment on the grounds that it expanded the ability of CDS vessels to compete in the domestic trades and urged upon Congress the result that the amendment did not offer them—the permanent bar of a vessel built with CDS assistance from the domestic trades.[11]

The agency has consistently interpreted the Act to authorize the release of domestic trade restrictions

[9] *See, e.g.*, H.R. Rep. 2168, 75th Cong., 3d Sess. 21 (1938).

[10] *Id.*

[11] Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committees on Commerce and Education and Labor, Part I, 75th Cong., 2d Sess. 44 (1937).

upon full CDS repayment. It first exercised the authority in 1964 in response to a request by Grace Line that the agency amend CDS contracts on two of its vessels to delete the domestic trade restrictions in exchange for full CDS repayment. At that time, the agency decided and the Comptroller General agreed [12] that no provision of the Act, including § 506, prohibited the exercise of that authority. Although the panel majority distinguishes the facts and quarrels with the reasoning of the Grace Line decision, the opinion quite plainly evidences the agency's considered view of its powers under the Act. That interpretation has been consistently, albeit sparingly, reaffirmed by the agency in the intervening years and, rather than attempting to curb the authority, Congress has knowingly approved the interpretation and promoted the exercise of the Secretary's permanent waiver authority.

Six years after *Grace Line*, Congress amended the Act including Title V in some detail, leaving intact the agency's 1964 interpretation of its Title V powers.[13] Two years later, in its 1972 amendments to Title XI of the Act, Congress specifically considered and indeed facilitated the exercise of the permanent release authority. Among the amendments adopted to improve the Act's responsiveness to the

[12] Comptroller General Decision B-155039, 44 Comp. Gen. 180 (1964).

[13] *See* P.L. 91-469, 84 Stat. 1018 (1970).

financing needs of the industry was § 1104(a)(3), 46 U.S.C. § 1274(a)(3). (App. B at 123a-124a.) Section 1104(a)(3) extends to the Secretary the authority to guarantee private obligations that aid in "financing, in whole or in part, the repayment of any amount of construction-differential subsidy . . ." As originally proposed, the section explicitly embraced full CDS repayments made to obtain the permanent release of trade restrictions.[14] In order to extend the financing guarantees to both full CDS repayment for trade restriction release and partial CDS repayment for § 506 temporary and incidental trade, Congress deleted the qualifying language that referred specifically to the permanent removal of trade restrictions. However, as the dissent recognizes, Congress' explanation of the amendment establishes unequivocally its knowledge and approval of the *Grace Line* authority. (*See* App. A at 57a-58a.)

The agency's interpretation in *Grace Line* and Congress' subsequent affirmation of its authority mer-

[14] As originally introduced, the bill provided for

> ". . . financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." H.R. 9756, 92d Cong., 1st Sess. § 3 (1971).

ited the deference afforded them by the district court and the dissent below.

> "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation." *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-382 (1969). (Footnotes deleted.)

See NLRB v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The agency interpretation must be affirmed unless it is unreasonable, *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), or there are "compelling indications" that it is incorrect. *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

c. *The Purposes and Policies of the Act*

The decision of the panel majority proceeds from its fundamental belief that the unsubsidized owner needs, is entitled by statute to receive, and has relied upon freedom from any competition with CDS-built vessels. The 40-year history of the Act contradicts this anticompetitive approach. The express and overriding purposes of the Act declare a policy of fortifying and increasing the number and competitive abilities of Jones Act vessels in both the United States domestic and foreign trades. The language and legislative history of the Act, particularly that of § 506, reveal no generalized congressional intent to bar competition between the subsidized and unsubsidized fleets but instead evince a circumscribed purpose to assure that all such competition would be fair.

Congress recognized the potential for unfair competition between subsidized and unsubsidized vessels under circumstances where the retention of the subsidy could afford a material competitive advantage. To eliminate unfair competition, § 506 exacts the price of domestic trading restrictions for the subsidy benefit. The full disgorgement of the subsidy, however, eliminates any unfair advantage that a CDS-built vessel might otherwise have. Indeed, as Judge Bazelon aptly observed below:

> Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator. The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as whole, to protect Jones Act operators from this type of competition. (Footnote deleted.) (App. A at 59a.)

The panel majority misapprehends the Act and its history by reading into it a purpose never intended—the isolation of subsidized and unsubsidized vessels into two "completely separate competitive areas." (App. A at 50a.) The majority's approach confuses the protectionist purposes of the Jones Act with the distinct purposes of the Merchant Marine Act, 1936. The Jones Act reserves United States domestic trade for U.S.-built and U.S.-flag vessels. The STUYVESANT satisfies all requirements of the Jones Act. The Merchant Marine Act, 1936, established a system for subsidizing U.S.-built and operated vessels in the foreign trade with the express objective of increasing the overall strength of the national merchant marine. All of the Act's multiple purposes, including the protection of the unsubsidized owner from unfair competition,[15] were served by the Secretary's decision concerning the STUYVESANT.

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[15] At the direction of the district court on remand, the agency reconsidered its decision admitting the STUYVESANT to the domestic trade with particular focus on the competitive impact of the vessel's entry on that trade. The agency invited and received comments from interested parties, including the respondents in this case. The conclusion reached in the agency's 37-page opinion was that the competitive effect of accepting CDS repayment under the approved terms and of allowing the STUYVESANT to engage in the Alaska trade is "none or minimal." (TT STUYVESANT—Repayment of CDS, Operation in Jones Act Trade, MSB Docket A-124, Final Opinion and Order on Reconsideration, January 6, 1978.)

The STUYVESANT became available for domestic commerce while it had been unmarketable in the United States foreign trade. The STUYVESANT remains capable of responding in a military emergency. The STUYVESANT continues to be owned and operated under a United States flag by United States citizens. The STUYVESANT is a safe vessel constructed in the United States and manned by trained, efficient United States personnel. The STUYVESANT's construction and the Secretary's financial aid to the shipyard made a significant contribution to the existence of domestic facilities for shipbuilding and repair. Finally, as an added advantage of the decision, the revenues generated by the sale and charter transaction permitted the repayment of debt guaranteed by the government and protected the collateral for the government's outstanding loans and guarantees.

The purposes of the Act are not furthered, and indeed are thwarted, by the profoundly anti-competitive view advanced by the panel majority. The Act does not license the unsubsidized owner's exploiting a demand/supply imbalance in the domestic trades when an American-built, owned and operated vessel is without a market and poses no unfair competitive threat in the domestic trade. In extending such commercial privilege to the respondents, the panel majority unduly credited their dramatic claims of surprise at the Secretary's action and of reliance upon the absence of permanent competition with vessels con-

structed with CDS assistance in the Alaskan oil trade. Pursuant to the six-month transfer and incidental trade provisions of § 506 and the permanent trade restriction release option exemplified by *Grace Line*, vessels built with CDS can and do fairly compete with other Jones Act vessels in the domestic trades. The possibility of full or part time competition with CDS vessels has been widely recognized by the industry for years. Moreover, the events that swelled the demand for tankers in Alaska were as unforeseeable as those that depressed the foreign market for such vessels.

The respondents, through this action, have strived vigorously to preclude the entry of a new competitor into the important Alaskan oil trade. The efforts of the respondents here parallel the requests made of Congress by unsubsidized operators in 1938. Only the result reached by the court of appeals is different. The decision of the panel majority awards the unsubsidized Jones Act owners the permanent monopoly in the domestic trades that Congress in the past refused to sanction.

The Merchant Marine Act, 1936—as originally enacted by Congress, as interpreted by the agency, and subsequently affirmed by Congress—affords the Secretary the necessary authority to respond to the extraordinary confluence of factors that prompted and support her STUYVESANT decision. The repayment of the CDS satisfies the congressional requirement of

fairness embodied in the Act. The employment of the vessel, the safeguarding of the federal guarantees and loans, and the assistance to the shipyard respond directly to the Act's overriding and fundamental goals to foster and maintain an efficient national merchant marine. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the [Secretary's] broad responsibilities . . . demand a generous construction of [her] statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (Citations deleted.) The decision of the panel majority undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades.

CONCLUSION

For all of the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE,
U.S. DEPARTMENT OF COMMERCE, ET AL.

(Civil Action No. 77-1647)

No. 78-1211

SHELL OIL COMPANY
(a Delaware Corporation), APPELLANT

v.

JUANITA M. KREPS
(INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE ACTING IN HER OFFICIAL CAPACITY), ET AL.

(Civil Action No. 77-1645)

No. 78-1212

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE
U.S. DEPARTMENT OF COMMERCE, ET AL.
POLK TANKER CORPORATION, ET AL., APPELLANTS

(Civil Action No. 77-1647)

No. 78-1281

SHELL OIL COMPANY
(a Delaware Corporation),

v.

JUANITA M. KREPS
(INDIVIDUALLY AND AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE ACTING IN HER OFFICIAL CAPACITY), ET AL.

SEATRAIN SHIPBUILDING CORP. AND
POLK TANKER CORP., APPELLANTS

(Civil Action No. 77-1645)

Appeals from the United States District Court
for the District of Columbia

Argued 16 October 1978

Decided 6 February 1979

Before BAZELON, MCGOWAN, and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILKEY.

Dissenting opinion filed by *Circuit Judge* BAZELON.

OUTLINE OF THE OPINION

Alaska Bulk Carriers v. *Kreps, et al.*

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WILKEY, *Circuit Judge*: This is an appeal from an unsuccessful challenge in the District Court by appellant-plaintiffs to action taken collectively by the Secretary of Commerce, the Maritime Administrator, and the Maritime Subsidy Board. The Agency (to use the term inclusive of the actions and authority of all appellee-defendants) had removed statutory restrictions barring operations of the 225,000-ton tanker *Stuyvesant* in the domestic maritime trade in exchange for the repayment (by 20-year promissory notes) of the entire $27.2 million subsidy the Agency had previously paid toward construction of the *Stuyvesant*. We hold that nothing in the Merchant Marine Act of 1936 [1] permits the *permanent* removal of the statutory bar to the utilization of construction-subsidized vessels in the domestic maritime trade, and therefore reverse the decision of the District Court.

I. BACKGROUND

A. *Statutory*

It has long been recognized that the cost of building ships in U.S. shipyards, and likewise the cost of operating vessels with American crews and according to American safety standards, is considerably higher than construction in foreign shipyards or operation with foreign crews. It has also long been recognized that an adequate merchant marine is vital to both the national defense and the commercial welfare of the United States.[2] Since the earliest days of the Republic, the problem of maintaining an adequate merchant marine in the domestic trade has been solved by preferential legislation that only U.S.-

[1] Pub. L. No. 74-835, ch. 858, 49 Stat. 1985 (20 June 1936), as amended, 46 U.S.C. § 1101 *et seq.* (1970).

[2] *See Sea Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 765 (D.C. Cir. 1977); Merchant Marine Act of 1936, 46 U.S.C. § 1101 (preamble); *Approval of Operating-Differential Subsidies Under Section 605(c) of the Merchant Marine Act of 1936: A New Standard for "Adequacy,"* [1978] DUKE L.J. 252.

built and U.S.-flag vessels can be operated in commerce between points in the United States.[3] The Jones Act, § 27 of the Merchant Marine Act of 1920,[4] provides that only vessels "built in and documented under the laws of the United States and owned by persons who are citizens of the United States" may engage in domestic trade, defined as trade "between points in the United States, including Districts, Territories, and Possessions thereof embraced within coastwise laws. . . ." [5] Since all ships operating in the U.S. domestic trade are both U.S.-built and owned, there has thus never been a need for a subsidy.

In U.S. foreign commerce, however, the practical competitive situation is otherwise. Every foreign nation with which the United States trades has precisely the same interests and precisely the same right to have cargo passing between the two countries carried in ships of its flag. If the construction and operating costs of the foreign-flag vessels are lower, which they are and have been for many years, then on a purely competitive basis both import and export cargo of the United States will be carried exclusively in foreign-flag vessels. To forestall this highly undesirable situation, Congress for many years has authorized both a subsidy for ships to

[3] *See* Act of 4 July 1789, ch. II § 5, 1 Stat. 24, 27 (discount on duties for goods imported in vessels owned by U.S. citizens); Act of 20 July 1789, ch. III, 1 Stat. 27 (tax on foreign vessels transporting U.S. products "coastwise" within the United States); Act of 1 March 1817, ch. XXXI, 3 Stat. 351 (direct prohibition of use of foreign vessels in domestic trade).

[4] P.L. No. 66-261, ch. 250, § 27, 41 Stat. 999 (5 June 1920), 46 U.S.C. § 8883 (1970). The term "Jones Act" is perhaps most commonly used to refer to § 33 of the Merchant Marine Act of 1920. *See* 41 Stat. 1007, 46 U.S.C. § 688 (1970). This section provides for recovery for injury to or death of a seaman. *See id.* In this opinion, however, we will use the term "Jones Act" to refer only to § 27 of the Merchant Marine Act of 1920.

[5] *See* Merchant Marine Act of 1920, *supra*, § 27, 46 U.S.C. § 883 (1970).

be built in U.S. yards and an operating-differential subsidy for the manning of American-flag vessels by American citizens in accordance with American safety standards. Under the construction-differential subsidy program,[6] which is the only subsidy at issue here, the Government may pay up to 50% of the construction costs of vessels needed for the U.S. foreign maritime trade.[7]

The U.S. merchant fleet is thus divided into two distinct segments. The "Jones Act" fleet, which operates in the protected U.S. domestic trade, cannot economically compete in foreign trade with either foreign ships or the U.S. subsidized fleet, because Jones Act ships are built and operated without subsidy and are thus far more costly to their American owners. The subsidized U.S. merchant fleet has never been allowed to compete in the domestic trade, because it would be grossly unfair to allow U.S. vessels which have received a sudsidy of up to 50% of construction costs to compete with U.S. vessels whose owners paid the full costs of construction in U.S. yards. The Jones Act preference legislation, designed to encourage construction in U.S. shipyards and the employment of U.S.-flag vessels in the domestic trade, all without direct cost to the taxpayers, would be completely negated if subsidized U.S.-flag competition were allowed to invade this protected reserve. As a consequence of such competition, American shipowners would be reluctant to build vessels without subsidy and the long-range investment decisionmaking of American shipowners and shipbuilders would be seriously upset.[8]

The appellants argue that "[u]ntil the agency actions complained of here, ships built in U.S. shipyards for the

[6] *See* 46 U.S.C. §§ 1151-61 (1970).

[7] *See* 46 U.S.C. § 1152(b) (1970).

[8] *See* Opening Brief for Appellants Alaska Bulk Carriers, Inc. and Trinidad Corp. at 6-8 [hereinafter cited as Brief for Alaska Bulk and Trinidad].

subsidized fleet were permanently barred from competing with the Jones Act fleet in the protected domestic trade."[9] Appellants point to § 506 of the Merchant Marine Act of 1936[10] as providing this statutory barrier. Section 506 provides that the owner of any ship built with construction-differential subsidy must agree that the vessel is to be operated only in foreign trade, except for certain intermediate stops in the United States or its territories as part of world-wide voyages or under temporary waivers granted by the Agency not to exceed six months in any one year.[11] The exact language of § 506 constituting this statutory bar, with two exceptions, is:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade . . . [or on voyages with intermediate stops as part of world-wide voyages] . . . and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay . . . . [a proportional amount of the subsidy]. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. [Proportional repayment of the subsidy again provided.]

While other sections of the Merchant Marine Act of 1936 are discussed by both sides in this case, § 506 is the centerpiece about which the argument turns, and in our view its proper interpretation is decisive here.

[9] *See id.* at 6.

[10] 46 U.S.C. § 1156 (1970).

[11] *Id.*

B. *Factual*

The *Stuyvesant*, a 225,000 deadweight ton oil tanker, was built at a total allocated cost of $102.7 million by Seatrain Shipbuilding Corporation.[12] The United States Government's contribution to the financing was as follows: [13]

$27.2 million—

> construction-differential subsidy awarded by the Agency in 1972, the equivalent of 26% of the total cost of construction of the Stuyvesant, under Title V of the Merchant Marine Act of 1936;

$30.2 million—

> loans guaranteed by the Agency under Title XI of the Act;

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[12] *See* Brief for the Secretary of Commerce and Other Federal Appellees at 15-16 & n.11. *Cf.* Affidavit of Robert Brown, Vice President-Finance of Seatrain Lines, Inc., parent company of intervenors Seatrain Shipbuilding Corp. and Polk Tanker Corp., Jt. App. at 256, 262 (approximate $120 million cost of eventual "sale" of *Stuyvesant* to United States Trust Company as owner-trustee for General Electric Credit Corporation) (affidavit dated 25 Sept. 1977) [hereinafter cited as Affidavit of Robert Brown]. Other estimations of the value of costs of construction of the *Stuyvesant* at different times, however, have yielded different figures. *See, e.g.*, letters of James Dawson, Jr., Secretary of Maritime Administration, to Polk Tanker Company and Queensway Tankers, Jt. App. at 208, 209; 213, 214 (construction costs of $70.2 million and net interest of $5.4 million, yielding figure of "final actual cost of construction" of approximately $75.6 million) [hereinafter cited as letters of James Dawson].

[13] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 257-61 (reviewing construction-differential subsidy payment for *Stuyvesant* and loans conferred or guaranteed by Economic Development Administration); letter of Howard Pack, Prseident of Seatrain Lines, Inc., to Robert Blackwell, Assistant Secretary for Maritime Affairs, Jt. App. at 190, 191 (noting debt financing under Title XI) (letter dated 8 July 1977) [hereinafter cited as letter of Howard Pack].

$5 million—

> loan by the Economic Development Administration (EDA), another agency of the Department of Commerce, for conversion from military to civilian purposes of the former Brooklyn Naval Yard, which constructed the *Stuyvesant* and other ships for Seatrain Shipbuilding Corporation (Seatrain);

$73.8 million—

> EDA guarantee to the extent of 90% of additional $82 million private loans to Seatrain Shipbuilding for the purpose of developing and maintaining the Brooklyn Naval Yard.

In accordance with § 506 of the Act, as a condition to receiving the $27.2 million subsidy, Seatrain and Polk Tanker Corporation (Polk), the vessel's purchaser, executed agreements to operate the *Stuyvesant* exclusively in the foreign trade of the United States.[14]

In contrast with two similar vessels constructed by Seatrain Shipbuilding, when the Title V subsidy and the Title XI financing insurance were awarded, the *Stuyvesant* had no firm commitment for employment in the foreign trade. Unfortunately, on its completion in 1977, there were still no prospects for the *Stuyvesant* in foreign comerce.[15] As the *Stuyvesant's* owners looked about

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[14] *See* Construction-Differential Subsidy Contract MA/MSB-164 between the Maritime Subsidy Board and Seatrain Shipbuilding Corp., Jt. App. at 112, 114 (subsidy conferred to aid construction of vessel "to be used in the foreign commerce of the United States") (preamble) (contract signed 30 June 1972); Contract between the Maritime Subsidy Board and Polk Tanker Corporation, Contract MA/MSB-165, Article 9(b)(i), Jt. App. at 160. 177 (purchaser agrees that vessel "shall be operated exclusively in foreign trade. . .") (contract signed 30 June 1972).

[15] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 257-60 (severe downturn in demand for crude oil tankers in 1975 forced cessation of construction of *Stuyvesant*, as well as of tanker *Bay Ridge*; construction of *Stuyvesant* recommenced upon agreement

for her gainful employment, they observed the changed situation in the carriage of Alaska oil. Contrary to original expectations, Alaska crude was not being carried from Valdez on relatively short hauls to U.S. West Coast ports, but because of the glut of oil in the West was being hauled around Cape Horn to the Eastern United States and the Caribbean. Furthermore, the world tanker tonnage over-supply had little effect on this trade, because this trade by U.S. maritime laws was largely confined to American-flag vessels.[16]

There was, however, one obvious obstacle: while the *Stuyvesant* was American-built, it was also constructed by subsidy and thus was not eligible for employment in the domestic coastwise trade. To overcome this obstacle in July 1977 the *Stuyvesant* owners applied for a three-year waiver of the § 506 restrictions on employment of the ship in other than the U.S. foreign trade, invoking the general contract-making authority of the Secretary of Commerce under § 207 of the Merchant Marine Act of 1936.[17] The present plaintiff-appellants and others

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by Standard Oil Company of Ohio (SOHIO) to charter vessel for three years of use in coastal "domestic" trade); Brief for Appellees-Cross Appellants Seatrain Shipbuilding Corporation and Polk Tanker Corporation at 8 (no business available for *Stuyvesant* in foreign commerce; SOHIO domestic charter the only option) [hereinafter cited as Brief for Seatrain and Polk Tankers].

[16] *See generally* Affidavit of Charles Dunagan, Shell Oil Company, Jt. App. at 282, 283-86 (comparing projected demand for tankers in the domestic Alaskan oil trade with available unsubsidizer tanker supply) (affidavit of 12 October 1977); Affidavit of of John Ervin, President of Trinidad Corporation), Jt. App. at 493, 496 (projected U.S. coastal trade is only viable market for unsubsidized domestic vessels) (affidavit of 21 September 1977).

[17] 46 U.S.C. § 1117 (1970) (authority to "enter into such contracts . . . as may . . . be necessary . . . to protect, preserve, or improve the collateral held by the [Federal Maritime] Commission . . . to secure indebtedness. . . ."). *See* letter of Howard Pack, *supra* note 13, Jt. App. at 190, 193-202 (application for three-year waiver, urging resolution of possible conflict between sections 207 and 506 of Merchant Marine Act of 1936, 46 U.S.C. §§ 1117 & 1156 (1970) in favor of section 207).

intervened before the Agency, pointing out that § 506 of the Merchant Marine Act specifically provided only for a six-month waiver and that there was no legal authority for a three-year waiver. In response to these objections, the *Stuyvesant* owners (intervening defendants here) withdrew their application.[18]

There followed a series of *ex parte* meetings between the Agency and Seatrain and Polk.[19] On 25 August 1977 Polk presented a new offer to the Agency, which would permit the *Stuyvesant* to operate in the Alaskan or any other domestic trade. The offer also provided that the Agency release the restrictions required by the statute and embodied in the subsidy contract upon Polk's execution of a twenty-year promissory note payable in 40 semiannual installments as reimbursement of the amount of the subsidy and other monies advanced by the Government.[20] This letter application was not published in the Federal Register, but the Agency by two letters of 31 August 1977 to Polk and Queensway Tankers, Inc. (the proposed operator of the *Stuyvesant*) approved the application to waive the restrictions *permanently* as well as various other features of the complicated refinancing necessary.[21]

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[18] *See* letter of Steve Russell, Polk Tanker Corporation, to Robert Blackwell, Assistant Secretary for Maritime Affairs, Jt. App. at 207 (withdrawing three-year waiver request) (letter dated 26 August 1977); Affidavit of Robert Brown, *supra* note 12, Jt. App. at 260 (application of Polk to Maritime Administration for three-year waiver withdrawn because of "numerous protests" against application).

[19] *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 10.

[20] *See* Affidavit of Robert Brown, *supra* note 12, Jt. App. at 260-61 (Polk offer to repay construction-differential subsidy in return for removal of domestic use restrictions); letter of Steve Russell, Polk Tanker Corporation, to James Dawson, Secretary of Maritime Administration, Jt. App. at 203 (formal application for removal of use restrictions and providing terms of subsidy repayment).

[21] *See* letters of James Dawson, *supra* note 12, Jt. App. at 208, 213 (outlining steps toward financing of *Stuyvesant*); letters of James Dawson to Polk Tanker Corporation, Jt. App. at 72-75 (per-

On 22 September 1977, appellants filed this action in the District Court, one day prior to the scheduled closing of the entire transaction. A temporary restraining order was granted, ultimately preliminary injunction was denied, and the transaction was consummated on 30 September 1977. After extensive discovery, cross-motions for summary judgment on the merits were filed and the District Court ruled for the defendants on the principal issue of the Agency's authority to waive permanently the restrictions on employment of the *Stuyvesant* in the U.S. domestic maritime trade.[22]

II. The Issue

We regard the issue as one of straightforward statutory interpretation, primarily of § 506, and, to whatever extent relevant, of other sections of the Merchant Marine Act of 1936.

The trial court phrased the first of his stated four legal issues as:

> [W]hether the Secretary has the legal authority under the Merchant Marine Act of 1936 to remove domestic trading restrictions upon the operation of a vessel built with . . . [construction-differential

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manently removing use restrictions on vessel to permit shipping of "Alaskan oil to the lower 48 states") (letter dated 31 August 1977). Because of the disposition we make of one issue we consider critical to this case, an examination of the other financing measures is not needed here. These measures are described in detail in the District Court's opinion. *See Shell Oil Co.* v. *Kreps, et al.*, 445 F.Supp. 1128, 1132-33 (D.D.C. 1977).

[22] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1138. Though the District Court decided other issues, such as the need to remand to the Agency for a determination of the competitive effect of the *Stuyvesant's* entry into domestic trade, *see id.* at 1140-44, none of these issues is relevant to the question which we find to be dispositive of this case.

> subsidy] in exchange for repayment in full of the . . . [construction-differential subsidy]. . . .[23]

The trial court found no explicit authority for the Agency action challenged here, either in § 506 or any other part of the Act, but held that there must be inherent Agency power after subsidy repayment to waive permanently the § 506 bar on a vessel's operation in the U.S. domestic trade. Our analysis is to the contrary: a proper construction of § 506 shows that the statute implicitly bars such waiver, the legislative history of § 506 supports this, and no other statutory provision either explicitly or implicitly gives rise to the authority asserted by the Agency here.

III. Analysis of Section 506 of the Merchant Marine Act of 1936

A. *Section 506 on Its Face*

The initial clause of § 506 is rather explicit:[24]

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade. . . .

Recalling our discussion above, the purpose of this clause is obvious: a construction-differential subsidy is only to make American-built vessels competitive with foreign-flag vessels in the foreign trade; there is no need or purpose to make subsidized vessels competitive in the U.S. domestic trade, because these vessels are exclusively built in American shipyards without subsidy. To put subsidized vessels into that trade would be unfair to owners who have built and purchased without Govern-

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[23] *See id.* at 1131. Since we reach a result opposite from that of the District Court on this issue, we do not find it necessary to reach the other three legal issues posited by the District Court.

[24] 46 U.S.C. § 1156 (1970).

ment subsidy, and ultimately would eliminate unsubsidized U.S. shipbuilding. Section 506, therefore, is *the clause* in the Merchant Marine Act which separates the two fleets, *i.e.*, the Jones Act domestic trade fleet (unsubsidized), and the U.S. foreign trade fleet (subsidized).

The statutory language is strong: "Every owner . . . shall agree." [25] It is not just the original builder or first purchaser, but every owner during the life of the vessel who must agree to the restriction.[26] The restriction is "that the vessel shall be operated exclusively in foreign trade," for the obvious purpose aforementioned. The restrictive language also refers to a subsidy which "has been paid." The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade. Payment of the subsidy stamps indelibly the character of the ship then and thereafter.

1. *Exclusion of Other Exceptions*

Section 506 not only mandates the owner's obligation to operate the vessel exclusively in U.S. foreign trade, but it provides the only exceptions to that obligation to be found in the Merchant Marine Act. These exceptions are, first, that certain intermediary stops may be made in the course of long voyages in foreign trade,[27] where the American vessel naturally would touch at more

[25] *Id.*

[26] Further, in the present case, a restriction on use of the *Stuyvesant* applicable to all future owners is written into the construction-differential subsidy contract itself. *See* Contract between the Maritime Subsidy Board and Polk Tanker Corporation, Contract MA/MSB-165, Article 9(d), Jt. App. at 160, 178 ("The foregoing provisions [which require the purchaser to operate the vessel exclusively in foreign trade] shall run with the title to the Vessel and be binding on all owners thereof.").

[27] 46 U.S.C. § 1156 (1970).

than one American port and it would be uneconomic to forbid the vessel to carry cargo between such American ports. Second, the Agency may consent to the *temporary* operation of a subsidized vessel in U.S. domestic maritime trade for a period not to exceed six months in any one year if such operation is deemed "necessary or appropriate to carry out the purposes" of the Act.[28] If either exception is invoked, the owner must pay back that part of the construction subsidy proportional to the period of the exception.[29]

In the entire Merchant Marine Act, only § 506 explicitly does these three things:

(1) mandates the vessel's exclusive operation in the U.S. foreign trade;

(2) provides two exceptions to such exclusive foreign trade operation; and

(3) authorizes the Agency to accept payback of subsidy for vessels to operate in the domestic trade.

The obligation of exclusive operation is clear, the two exceptions are precise and limited, and the financial consequences of invoking the exceptions are equally precise and clear.

Since these provisions are so clear on the face of the statute, we are puzzled by the trial judge's statement that ". . . *nothing* in section 506 . . . either expressly or implicitly addresses the issue of *permanent* revocation of a . . . [construction-differential subsidy] contract." [30] By the usual canons of statutory construction, we think the issue of *permanent* revocation of a construction-

[28] *Id.*

[29] *Id.*

[30] *Shell Oil Co.* v. *Kreps et al.*, 445 F.Supp. at 1135 (emphasis of the District Court).

differential subsidy contract *is* addressed implicitly by the specific enumeration of the permissible exceptions to the vessel's permanent dedication to U.S. foreign trade. Where a statutory mandate is laid down, followed by specifically enumerated exceptions to such mandate, and where neither this mandate nor exceptions thereto are found anywhere else in the same statute, we think that the unquestioned canon of statutory construction is that the enumerated exceptions are *exclusive*, and that any other exception (here, permanent waiver or revocation of vessel use restrictions) is ruled out implicitly.[31]

2. *Findings of Need as Essential Basis for Limited Waiver*

That § 506 implicitly forbids the *permanent* lifting of the bar to employment of the subsidized vessel in the domestic trade is borne out by examination of the procedure for implementing the limited waiver which *is* authorized by § 506. On inquiry by the court at oral argument as to what finding the Secretary would need to make under § 506 to justify consent to place the subsidized vessel for six months in the domestic trade, counsel for the Agency promptly replied, ". . . what the need . . . [for vessels] will be in the foreseeable future . . . ." [32] It was then observed that § 506 requires

[31] *See, e.g., National Railroad Passenger Corp.* v. *Nat'l Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974), *reh. denied*, 415 U.S. 952 (1974) *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942); *Saxon* v. *Georgia Ass'n of Independant Insurance Agents, Inc.*, 399 F.2d 1010, 1013-14 (5th Cir. 1968); *Gotkin* v. *Miller*, 379 F.Supp. 859, 865 (E.D. N.Y. 1974), aff'd, 514 F.2d 125 (2d Cir. 1975); *Herzberg* v. *Finch*, 321 F.Supp. 1367, 1369 (S.D. N.Y. 1971).

[32] Statement of Michael Kimmel, representing the Secretary of Commerce, 16 October 1978.

This response of counsel is supported by the criteria for granting a six-month waiver to the prohibition of domestic use of subsidized vessels set forth in the Federal Regulations. In a

a partial return of the subsidy proportional to the limited term the vessel is permitted in the domestic trade, and therefore a complete return of subsidy might be thought consistent with a permanent lifting of the barrier against employment in the domestic trade, if such permanent waiver were authorized. Continuing with the analysis, the question then arises, what finding should the Secretary make as a basis for consent to the *permanent* waiver of the restriction? To this Government counsel responded that prediction of need for a vessel "would be really . . . impossible to make over 25 years. The Secretary can only predict what the needs will be . . . [for] about three years." [33]

Thus the analysis of the Government will not stand up. Where a waiver for a limited period is involved, it is rational to believe that the Secretary can make a finding of need for the vessel for a limited period of time, since the Government agencies and private businesses frequently make economic judgments for a period of six months. In the case at bar, the determination by the Secretary of the need for the *Stuyvesant*, and the noncompetitive effect of the *Stuyvesant's* entry into the Alaska oil trade, was made for a limited period. However, a finding of need and no competitive effect resulting from the entry of a subsidized vessel into the entire U.S. domestic trade for the permanent life of the vessel

final agency rule with effective date of 30 June 1977, the Maritime Administration provided that the owner or charterer of a tank vessel in applying for such a waiver must disclose for agency consideration "[a]ll available information to support the applicant's assertion that suitable vessels of a competitor would not be available for the prospective voyage or voyages." In addition, the rule that provides that consideration will be made by the Administration of all timely protests to the waiver request received from prospective competitors. *See* 46 CFR Ch. II, Part 250, subsections 250.3 & 250.4, *reprinted in* 42 FED. REG. 33035-36 (1977).

[33] *See* Statement of Michael Kimmel, *supra* note 32.

—a period in excess of 25 years—is a finding impossible to make. No Government agency or private enterprise can logically make a finding of need for this or any other vessel for its entire life.[34]

[34] This assessment was apparently shared by the Maritime Subsidy Board, Maritime Administration, and Department of Commerce (collectively, the Agency) in the Agency's Final Opinion and Order on Remand for Reconsideration from the District Court's earlier opinion. *See T. T. Stuyvesant—Repayment of CDS Operation in Jones Act Trade,* MSB Docket No. A-124 (6 Jan. 1978) [hereinafter cited as *T. T. Stuyvesant—Repayment of CDS*], Jt. App. at 590, on remand from the District Court's opinion in *Shell Oil Co.* v. *Kreps et al., supra.* On the issue of the likely competitive effect of a permanent waiver of the *Stuyvesant's* use restrictions, an issue which the District Court found had been afforded inadequate consideration by the Agency, *see id.* at 1140-43, the Agency found that an "assessment of [future] supply and demand" for tankers in the Alaska oil trade is "based on a number of variables that might change." *T. T. Stuyvesant—Repayment of CDS, supra,* Jt. App. at 610. These variables include the degree of foreign flag-ship carriage of Alaskan oil to the Virgin Islands, *see American Maritime Association* v. *Blumenthal,* —— F.2d —— (D.C. Cir. 1978) (foreign-flag vessels not barred by Jones Act from carrying Alaskan oil to Virgin Islands and then carrying products refined from that oil to mainland from Virgin Islands); need for tankers in Soviet grain programs; the possibility of reduced cargo deadweight passage of large vessels through the Panama Canal; the effect of implementation of more stringent U.S. Coast Guard pollution control regulations; and the possibility of increased mainland production. *See T. T. Stuyvesant—Repayment of CDS, supra,* Jt. App. at 610-11. As a result of these and other "uncertainties," the Agency on remand *in early 1978* found that it was "difficult or impossible to predict the supply and demand of tankers in the Alaska oil trade *beyond 1980. . . .*" *See id.* at 611 (emphasis added). Despite these findings, the Agency aimed to bolster its decision to waive permanently the use restrictions of the *Stuyvesant* by concluding that "there is no substantial basis known on which to conclude that . . . [permanent waiver of use restrictions on the *Stuyvesant* would bring about] any unfair competition through displacement of any unsubsidized vessels that may be in . . . [the Alaska oil] trade in the future." *Id.* We would conclude just the opposite: That because of numerous uncertainties involved in both the global and domestic oil trade, and consequently in the demand for vessels to carry that oil, there is no rational basis on which a finding of need can be made for a vessel in a particular trade for that vessel's life—a period *much longer* than the three year limit to estimation of future need set by the Agency.

If it is logically possible to make a finding of need and noncompetitive effect for a limited period of six months, or perhaps even three years, then lifting the restrictions for that limited period has a logical basis. If it is logically impossible to make a finding of need or noncompetitive effect on a permanent basis, for the entire life of this new vessel, *then it is logically impossible to make the only finding which will sustain rationally the waiving of the restriction against the employment of the subsidized vessel in the domestic trade.* For a limited period the finding to sustain the waiver can be made; for an unlimited period the finding to sustain the waiver cannot be made; therefore, the waiver for a permanent period cannot be made.

B. *Legislative History of Section 506*

We think that § 506 properly analyzed forbids by implication the grant of the permanent waiver by the Agency here. The trial court asserted that "*nothing* in section 506 . . . or in the legislative history of these provisions either expressly or implicitly addresses the issue of *permanent* revocation of a . . . [construction-differential subsidy] contract."[35] Since we do, however, find support in the legislative history for the statutory interpretation set forth above, we will discuss briefly the legislative history as we have found it.

1. *The Original 1936 Act*

Prior to the enactment of the Merchant Marine Act of 1936, the question of possible permanent release from the restriction against the employment of subsidized vessels in the U.S. domestic trade was discussed. Some original proponents of the 1936 Act urged inclusion of a provision allowing such release; others did not. All in

[35] *See Shell Oil Co.* v. *Kreps et al., supra,* 445 F.Supp. at 1135 (emphasis of the District Court).

all, some fifteen versions of the finally enacted Merchant Marine Act of 1936 were considered.[36] A number of drafts of the eventual § 506 which were before the Congress in 1935 and 1936 provided for time-unlimited waivers conditioned upon repayment of subsidy.[37] For example, the bill that first passed the House in 1935, but failed to win approval in the Senate, allowed a vessel constructed with the aid of Government subsidy to operate in the domestic trade, if the owner received the "written consent of the . . . [Agency] so to operate" and repaid to the United States that amount of the construction subsidy proportional to the "remaining economic life of the vessel." [38] Since the prior experience of Congress with construction subsidies had shown that the domestic operation of ships constructed under subsidy could disadvantage the unsubsidized Jones Act fleet,[39]

[36] *See, e.g.*, H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate 13 May 1935, reported with an amendment, 29 July 1935); S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate 6 January 1936); S. [illegible] 74th Cong., 2d Sess. § 506 (introduced in the Senate 24 February 1936); S. 4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate 24 February 1936); H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate 24 April 1936).

[37] *See, e.g.*, H.R. 7521, 74th Cong., 1st Sess. § 504 (1935) (introduced by Judge Bland, Chairman of House Committee on Merchant Marine and Fisheries); S. 2582, 74th Cong., 1st Sess. § 504 (1935) (introduced by Sen. Copeland, Chairman of Senate Commerce Committee).

[38] *See* H.R. 8555, 74th Cong., 1st Sess. § 507(b), passed by the House 27 June 1935. *See also* H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935) (report of House Committee on Merchant Marine and Fisheries, to accompany 1935 version of H.R. 8555, not passed by the Senate) ("The . . . [Agency] may, on certain conditions, consent to the operation of . . . a [subsidized] vessel in the domestic trade in which case . . . [a proportional] amount of the subsidy shall be repaid . . . .").

[39] *See* S. Rep. No. 898, 74th Cong., 1st Sess. 14-15 (1935) (intercoastal mail delivery by subsidized American vessels works to disadvantage of unsubsidized American competitors and to American merchant marine).

later drafts reported to the Senate restricted the Agency's authority to lift the restriction against domestic trading. For example, one draft considered by the Senate in 1936 permitted permanent waivers, *but* provided that the Agency could not grant any waiver transferring a subsidy-built vessel to the domestic fleet "except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce" in a particular domestic service "in which it is proposed to operate such vessel." [40]

The drafting and redrafting process, with numerous conflicting versions of the Merchant Marine bill appearing and disappearing, understandably introduced certain confusions and conflicting passages in the ultimate legislation. The final Act [41] included visible traces of individual legislators' conflicting desires which produced a § 506 that, although ambiguous, could have been construed to mean that permanent release could be granted by the Agency on repayment of that part of the subsidy proportional to the remaining life of the vessel.

As originally enacted in 1936, § 506 read: [42]

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an

[40] S. 3500, 74th Cong., 2d Sess. § 506(c) (introduced in the Senate 6 Jan. 1936).

[41] *See* Pub. L. No. 74-835, ch. 858, 49 Stat. 1985 (29 June 1936), now amended, 46 U.S.C. § 1101 *et seq.* (1970).

[42] *See id.*, 49 Stat. 1999 (emphasis added).

island possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life.* If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. . . .

The ambiguities of the language above are apparent. Although the non-italicized first half of the long first sentence of the 1936 version generally prohibited domestic operation of a subsidized vessel, the italicized second half of that sentence arguably created a general exception to that prohibition. That exception was conditioned only upon "written consent of the Commission" and agreement by the shipowner to repay to the Commission an amount of subsidy proportional to the "remaining economic life of the vessel." This exception was not expressly confined to any particular economic conditions or to any type or duration of voyage. The second sentence of the section dealt with temporary transfers of a subsidized vessel to domestic service at times of "emergency," and could be read not to limit the much broader exception to the prohibition provided in the first sentence. It was thus possible to read the 1936 version of § 506 as authorizing both (1) an unlimited waiver (despite the absence of specific reference to such a waiver), conditioned only upon approval of the Commission and the shipowner's agreement to repay a portion of the subsidy; and (2) a temporary waiver allowable for a period of three months, and only in the case of national emergency.[43]

On the other hand, the second sentence of § 506 as passed in 1936 could also be read as qualifying the first sentence, so as to disallow permanent waivers in favor of waivers allowable for periods of no more than three months in the event of an "emergency."[44] Regardless

[43] This interpretation is supported by commentary inserted in the record of Senate Hearings by Senator Guffey, sponsor of S. 4110, 74th Cong., 2d Sess. (1936), concerning two of the three bills that formed the basis of the committee print eventually passed by the Senate in 1936 and later also by the House, as the Merchant Marine Act of 1936. *See Merchant Marine Act, 1936: Hearings Before the Committee on Commerce of the United States Senate,* 74th Cong., 2d Sess. 121, 124 (1936) (comment on S. 3500, bill introduced by Sen. Copeland and altered in committee print 3 March 1936) ("Section 506(b) . . . states that, *except as later provided,* no vessel on which a subsidy has been paid shall be operated in other than foreign trade *unless the unamortized construction differential is repaid to the* [*Agency*] . . . .") (emphasis added); *id.* at 133 (comment on S. 4110, bill introduced by Senator Guffey) ("Provision is made . . . for the transfer of . . . [a subsidized] vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy.").

[44] Though this reading of the language seems less plausible to this court than the earlier one, and is urged by none of the parties to this case as the correct reading of the statute in force in 1936, the Chairman of the U.S. Maritime Commission in testimony before a House Committee in 1938 premised his proposals for amendments to the section on the fact that the interrelation between the first and second sentences of § 506 was unclear. He proposed an amendment to the section which led to the deletion of all language in the first sentence that appeared to authorize a permanent waiver and which was arguably in conflict with the second sentence, thus removing the very source of the claimed "ambiguity." *See* pp. 27-30 & notes 46-53 *infra.*

of one's reading of the language of § 506 as enacted in 1936, however, it is perhaps most critical to the present case to note that legislative history of the section shows that *the issue of use restriction waivers—whether temporary or permanent, and whether allowed or disallowed —was addressed by that section and nowhere else in the Merchant Marine Act of 1936.* Not a scintilla of legislative comment or debate has come to light which indicates that any other section or provision of the Act provided authority for, or was intended to deal in any way with, the issue of waivers to restrictions imposed by § 506.[45]

2. *1938 Amendments*

In 1938, comprehensive amendments were passed to the Merchant Marine Act of 1936.[46] With regard to § 506 of the Act, then Maritime Commission Chairman Joseph P. Kennedy stated that the purpose of the proposed amendment was to remove "ambiguities" and "confusions" in the section, described as follows: [47]

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[45] Appellees, however, have claimed to find such authority in § 207 of the Act. *See* pp. 44-46 & notes 104-10 *infra.*

[46] *See* Act of 23 June 1938, § 18, 52 Stat. 958 (amending § 506).

[47] *See Amending Merchant Marine Act, 1936: Hearings on H.R. 8352 Before the House Committee on Merchant Marine and Fisheries,* 75th Cong., 2d & 3d Sess. 8 (1937-38) (emphasis added) [hereinafter cited as *House Hearings on 1938 Amendments*].

Appellants have appropriately pointed out, *see* Brief for Appellant Shell Oil Co. at 33-34, that the Commission Chairman's interpretation of the Amendments proposed in 1938 and of the reasons for their proposal are entitled to carry weight, since the Chairman headed the agency that administered the Act at the time of the Amendments, *see Zemel* v. *Rusk,* 381 U.S. 1, 11 (1965), *reh. denied,* 382 U.S. 873 (1965); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965) *reh. denied,* 380 U.S. 989 (1965), and the Chairman played an active role in drafting the legislation and obtaining its passage, *see Zuber* v. *Allen,* 396 U.S. 168, 192-93 (1969) (departmental construction of its enabling legislation carries most weight when administrators participated in drafting and made known their views before Congress in hearings). Furthermore, the Chairman's views as stated in

> The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. *Whether this right is restricted to the cases of emergency and to periods of three months as mentioned in the section, it is difficult to determine.*

When the Maritime Commission Chairman noted that "[it is difficult to determine] [w]hether this right [to engage in non-excepted services] is restricted to . . .," he referred to "the cases of emergency and to periods of three months." He did not specifically mention the other alternative of his "whether," but this could only have been the arguable alternative at the end of the first sentence of § 506 as enacted in 1936, *i.e.*, the ambiguous reference to repayment of subsidy proportional to the economic life of the vessel in return for the lifting of restrictions on the use of that vessel.[48] Thus the Maritime Commission Chairman sought to relieve the ambiguity of whether the section authorized a permanent lifting of use restrictions in return for repayment of subsidy, or merely a temporary waiver on the ground of emergency. The proposed 1938 amendment, which was adopted by both Houses and stands essentially un-

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hearings were accepted almost verbatim into the reports of both of the committees of Congress responsible for acting on the Amendments, *see* p. 29 & note 52 *infra,* and we find that the Chairman's interpretation of the meaning and purpose of the Amendments is the most plausible one in light of the language of the Amendments themselves, *see* p. 28 *infra.*

[48] *See* p. 24 *supra.*

changed as the present § 506,[49] resolved the ambiguity by eliminating all of the language in the original section that established the arguable exception to that section's general prohibition of domestic use, *i.e.* the clause that begins, "unless the owner [shall receive consent] . . ." [50] Thus the amendment removed the only language that could be interpreted to authorize a permanent waiver, and substituted therefor a clause requiring repayment of subsidy proportional to the gross revenue derived from the domestic leg of a foreign voyage.

The Maritime Commission Chairman described the effect of these changes as follows: [51]

> If the owner desires to engage in domestic trades other than . . . [domestic portions of world voyages], he can do so only by receiving the consent of the Commission. *The consent for this service is limited to 6 months in any one year.* . . . [T]he section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.

This explanation by the Commission Chairman was incorporated almost verbatim into both the Senate and House reports which accompanied the bill amending § 506 in 1938,[52] thus demonstrating irrefutably that Congress

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[49] *See* 46 U.S.C. § 1156 (1970), *reprinted* at pp. 8-9 *supra.*

[50] *See* language of § 506 in original 1936 Act, *reprinted* at pp. 23-24 *supra.*

[51] *See House Hearings on 1938 Amendments, supra* note 47, at 8-9.

[52] The Senate Commerce Committee, *see* S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938), stated (emphasis added):

> Section 506 has been entirely rewritten to remove ambiguities and confusion. . . . The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade. . . . The section further provides . . . that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the . . . subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months. . . .
>
> As the section is rewritten, it is . . . provided that *the Commission may consent in writing to the temporary transfer of . . . a vessel to services other than those enumerated for periods not exceeding 6 months in any year* whenever the Commission may determine that such transfer is necessary.

Similarly, the House Committee on Merchant Marine and Fisheries, *see* H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938), stated (emphasis added):

> Section 506 . . . has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. *As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade.* . . . No fundamental change in the original purpose of the section has been effected.

Appellees have suggested that the House Committee, in noting that "no fundamental change in the original purpose of the section has been effected" by the 1938 Amendment, must have intended that any authorization that existed in the 1936 Act for permanent waivers must have been carried through with the 1938 Amendments. *See* Brief for Seatrain and Polk Tankers, *supra* note 15, at 31. As we noted earlier, however, the most fundamental purpose of § 506, as generally of the Merchant Marine Act of 1936, was to provide subsidies to allow the American merchant marine to compete in foreign trade, and to separate the subsidized American fleet from the unsubsidized "Jones Act" fleet. *See* pp. 7-8 *supra.* It was undoubtedly this "original purpose" of Section 506, and of other sections of the Act, to which the House Committee referred in its report.

[53] *See* pp. 31-32 *infra.*

intended in 1938 to allow only temporary waivers, with duration of no more than six months.[53]

Thus it does not now matter whether some of the sponsors of the 1936 Act believed that language in the statute authorized a permanent lifting of restrictions in return for repayment of the full subsidy, because the action of the Congress in 1938 resolved the ambiguity

by removing from § 506 the only language which could be interpreted to authorize more than a temporary waiver of the restriction against employment in the domestic trade. In 1938 the intention of Congress was unmistably manifested: to eliminate the only statutory language which could arguably have authorized the permanent waiver of the domestic trading restriction upon repayment of subsidy, and to limit the waiver of the domestic trading restriction to six months in any one year, with no discretion in the Secretary to authorize a longer period.

No one in the present case, however, now contends that § 506, as amended, authorizes permanent waivers. The trial court specifically so stated,[54] and looked elsewhere in the statute for inherent authority in the Secretary to do this.[55] However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.[56]

As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in

[54] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1134-35.

[55] *See id.* at 1134.

[56] For discussion of these claims of authority found elsewhere in the Act, see pp. 44-52 & notes 104-29 *infra.*

1938 determined, on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize. Contrary to the assertion of the trial court that there was "nothing" in the legislative history of § 506 concerning permanent waivers,[57] and the court's further reference to "this total dearth of guidance from the statutory language and the legislative history," [58] we find ample legislative history relevant to this question. Legislative history of the 1936 Act is somewhat ambiguous, as was the 1936 statute itself. The legislative history of the 1938 amendment, however, confirms our present interpretation of the statutory language and demonstrates that whatever vestigial authority there was in the original 1936 Act to issue permanent waivers was eliminated by the 1938 amendment.

C. *Administrative Interpretation*

After remarking, erroneously we hold, on the "total dearth of guidance from the statutory language and the legislative history" of § 506, the trial court thus found a justifiable basis for turning to "other indicia of legislative intent" and "whether the [A]gency's interpretation of the Act 'serves to further the purposes of the legislation. . . .' " [59] The principal Agency interpretation cited by the court is "the Comptroller General's 1964 decision with respect to two . . . ships owned by Grace Line . . . both of which were built under . . . [construction-

[57] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1135.

[58] *See id.*

[59] *See id.*, citing *Sea-Land Service, Inc.* v. *Kreps,* 566 F.2d 763, 778 (D.C. Cir. 1977).

differential subsidy] contracts. . . ." [60] In that 1964 decision [61] the Comptroller General advised the Secretary of Commerce, in accord with a legal opinion on the same question issued earlier by the Acting General Counsel to the Maritime Administration,[62] that the Agency had the legal authority to remove provisions in two construction-differential subsidy contracts signed between the Agency and Grace Line barring domestic operations of two Grace Line vessels, in return for "repayment to the Government of the unamortized construction-differential subsidy. . . ." [63] The Comptroller General reasoned that, "Upon the basis of the rationale for the repayment of subsidy [provided for by section 506 of the Merchant Marine Act of 1936], it appears that if . . . the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel . . . and should not be bound to operate the vessel exclusively in foreign trade." [64]

The *Grace Line* affair, however, is no precedent [65] for what the Agency has attempted to do here. First, the two Grace Line vessels were not *built* under construction-

[60] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1136.

[61] *See* Comptroller General Decision B-155039, 44 Comp. Gen. 180 (1964).

[62] Memorandum from Graydon L. Andrews, Acting General Counsel, Maritime Administration, to the Chairman, Maritime Subsidy Board, Jt. App. vol. III at 660-65 (Memorandum dated 28 July 1964).

[63] *See* Comptroller General Decision B-155039, *supra,* 44 Comp. Gen. at 184.

[64] *Id.*

[65] Appellants argue further that the Comptroller General Decision is incorrect on substantive grounds. *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 33-34. In light of this court's opinion in the present case, we can only agree with appellants' argument. It is sufficient at present, however, to find that the Decision does not serve as precedent here.

differential subsidy contracts; they were originally built *un*subsidized, then later converted from cargo to container vessels by subsidy funds for use in foreign trade.[66] The 1964 action by the Agency was on the proposal of Grace Line, which was experiencing difficulties in operating the vessels abroad, to sell the vessels to a domestic operator for use in the domestic trade.[67] As we discuss in Part V, *infra,* the fact that the vessels were originally constructed in American yards without subsidy is important for basic Merchant Marine Act policies.[68] Competing domestic operators could take the tonnage of these vessels into account at the time the vessels were built in making their own future investment decisions. However, in the instant case, American carriers estimating future demand for Alaskan oil tankers could not have known that the *Stuyvesant,* under construction in American yards *with* subsidy, would in its initial operation try to enter the Alaskan market in competition with unsubsidized vessels.[69]

Second, the request to return the Grace Line vessels to the unsubsidized fleet was unopposed, so far as the record shows. It is also significant that there was no court test of the validity of the Agency's action in removing the restrictions on the vessel's use.[70]

[66] *See* Comptroller General Decision B-155039, *supra,* 44 Comp. Gen. at 180.

[67] *See id.*

[68] These fundamental policies were nowhere considered in the 1964 Comptroller General Decision, *see id.,* or in the earlier memorandum of the Maritime Administration Acting General Counsel to the Maritime Subsidy Board, *see* note 62 *supra.*

[69] *See generally* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 6-8 (need to keep subsidized and unsubsidized fleets separate to enhance long-range investment decisions).

[70] Furthermore, the Comptroller General Decision is not binding on this court. *See Keco Industries, Inc.* v. *Laird,* 318 F. Supp. 1361. 1363 (D.D.C. 1970) (Comptroller General's opinion on legality of

Finally, the 1964 Comptroller General's opinion is totally inconsistent with the trial court's rationale as to the source of the Agency's authority to accept the return of subsidy in exchange for a waiver of use restrictions. The trial court specifically held that "*nothing* in section 506 . . . either expressly or implicitly addresses the issue of *permanent* revocation . . .," [71] and rested its approval of the Agency's action on the ground that "such authority is inherent in the Secretary's broad contractual authority provided by sections 504 and 207, 46 U.S.C. §§ 1154 and 1117" and is "expressly contemplated by section 1104(a)(3), 46 U.S.C. § 1274(a)(3) . . . ." [72] In 1964, however, the Comptroller General's opinion relied *solely* on § 506 as the source of the Agency's authority.[73] Therefore, we held that the 1964 *Grace Line* opinion furnishes no precedent for the trial court's rationale of a permanent waiver authority implicit somewhere else in the Act.

Nor do we agree that "[s]ince the 1964 *Grace Line* transaction, the Secretary has consistently interpreted section 506 as *not* precluding permanent waiver of domestic trading restrictions. . . ." [74] We find the Agency's internal interpretations of dubious consistency, and neither numerous nor impressive. In fact, the most thoroughly developed Agency interpretation cited by the court provides no support whatsoever for the Agency's

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contract not binding on courts); *United States ex rel Brookfield Construction Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C. 1964), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964) (Opinions of Comptroller General binding only on Executive Branch).

[71] *Shell Oil Co.* v. *Kreps, et al., supra*, 445 F. Supp. at 1135.

[72] *Id.* at 1134.

[73] *See* Comptroller General Decision B-155039, *supra*, 44 Comp. Gen. at 181-84.

[74] *Shell Oil Co.* v. *Kreps, et al., supra*, 445 F. Supp. at 1137.

action in the present case.[75] This Agency interpretation was formulated in response to the application in 1970 of Seatrain Lines, Inc., the parent corporation of the appellee Seatrain Shipbuilding Corporation here, for a construction-differential subsidy for two vessels other than the *Stuyvesant*. As part of its application, Seatrain sought from the Agency a contractual prior commitment to authorize future "*permanent* operation of the vessels in the domestic trade upon the repayment of the unamortized portion of . . . [the subsidy]." [76] In an opinion considering the legality of such a provision, the General Counsel to the Maritime Administration urged strongly against granting Seatrain's request because advance agreement to waive the prohibitions of § 506 would "conflic[t] . . . with the basic purposes of the . . . [construction-differential subsidy] provisions of the . . . [Merchant Marine Act of 1936]." [77] The General Counsel pointed out, as in the present opinion we have as well, that "Neither section 506 nor any other provision of the Act relating to the . . . [construction-differential subsidy] provides for releasing a . . . [ship built with such subsidy] from the domestic trade restrictions imposed by section 506 upon repayment of unamortized . . . [subsidy]." [78] The General Counsel no more than *implied* in his opinion that the Agency might have authority in a future case to grant a timely request for such a waiver,[79] and he set forth no circumstances or

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[75] *See* Legal Opinion of H. Clayton Cook, Jr., General Counsel to Maritime Administration, Department of Commerce, Jt. App. at 666-68 (10 December 1970) [hereinafter cited as 1970 Seatrain Opinion].

[76] *See id.*, Jt. App. at 666 (citing formulation of Seatrain's request by Department of Commerce) (emphasis in the original).

[77] *Id.*

[78] *Id.* at 668.

[79] *See id.* ("To approve an application for . . . [subsidy] on the basis proposed by Seatrain would, in effect, bind future Boards to exercise a discretionary authority . . . .").

conditions under which he believed such approval would be appropriate.[80] It is incredible, therefore, that the trial court and appellees in the present case find support in this General Counsel's opinion for the Agency's claim of authority to waive on a permanent basis the prohibitions of section 506.

The other Agency interpretations cited by the trial court are no more compelling.[81] The trial court reports that in 1976 the Agency amended two subsidy contracts to permit subsidy repayment and possible future entry into the domestic trade of two vessels operating between the Virgin Islands and the continental United States, "*if* the non-domestic status of the Virgin Islands is changed at some later date."[82] These contract amendments by

[80] The opinion suggested only that the Government in granting any such waiver—the propriety of which the General Counsel directly questioned, *see* p. 34 *supra*—would need to be assured an "adequate consideration." *See id.*

[81] *See Shell Oil Co.* v. *Kreps, et al., supra,* 445 F.Supp. at 1137.

[82] *See id.* (emphasis of the District Court). The Agency and shipowner in that instance were referring to § 21 of the Merchant Marine Act of 1920, 46 U.S.C. § 877 (1970), which excludes the Virgin Islands from the "coastwise laws of the United States until the President shall . . . declare that such coastwise laws shall extend to the Virgin Islands . . . ." This provision has the effect, until possible reversal by the President, of exempting ships carrying goods to and from the Virgin Islands from the domestic flag-ship requirements of the "Jones Act," § 27 of the Merchant Marine Act of 1936, 46 U.S.C. § 883. *See American Maritime Association* v. *Blumenthal,* No. 77-1934 (D.C. Cir. 20 Nov. 1978), slip op. at 18-19 n.43 (for limited purposes of Jones Act, Virgin Islands analogous to a foreign port). Owners of ships involved in the Virgin Islands trade may be understandably reluctant to bind themselves to an indefinite contractual bar against domestic use of those ships in light of the hotly contested status of the Virgin Islands exemption. *See id.,* slip op. at 25 & n.59 (ten bills introduced in various sessions of Congress to modify or repeal Virgin Islands exemption). Though we pass no judgment on the matter at the present time, in light of the court's present opinion we doubt that it would be appropriate to allow a shipowner to effect an end-run around the domestic use proscriptions of § 506 of the Merchant Marine Act of 1936, at issue here, even under the anomalous and potentially variable circumstances of the Virgin Islands trade.

the Agency were conditional, restricted, as yet unexercised, and therefore as yet unchallenged in any court. One further instance of Agency approval of a prospective waiver of domestic use restrictions on subsidized vessels has also been reported.[83] This waiver option, like that granted to the two vessels operating in the Virgin Islands trade, was apparently approved despite the earlier opinion of the General Counsel to the Maritime Administration in 1970 that such prospective agreement would "conflict with the basic policies" of the Merchant Marine Act of 1936 and, further, that no waiver of the § 506 proscription was authorized either by § 506 or by any other provision of that Act.[84] Also, the vessels which were the subject of this waiver, like the two Virgin Islands vessels, have not yet exercised their option and entered the domestic trade.[85]

Though the Agency actions on behalf of the owners of these various ships are arguably consistent with each other (if not with the advice of Agency legal counsel), they are all distinguishable on their facts from the present case, where an immediate rather than a prospective waiver is sought. The Agency actions do not, in any event, constitute compelling precedent in view of our present construction of the law, and clearly they do not bind this court.

The Grace Line reconversion remains the only instance of actual entry into domestic operations by vessels that

[83] *See* Affidavit of James S. Dawson, Jr., Secretary of Maritime Administration and Martime Subsidy Board, Jt. App. at 278, 280 (affidavit dated 28 September 1977) (approval granted in August 1977 of request by Wilmington Trust Company to repay construction-differential subsidy on two vessels under construction for trade between Indonesia and Japan).

[84] *See* 1970 Seatrain Opinion, *supra* note 75, Jt. App. at 666, 668.

[85] *See* Affidavit of James S. Dawson, *supra* note 83), Jt. App. at 280.

received construction-differential subsidy, but, as discussed above,[86] this Agency action likewise does not serve as precedent here. We also do not believe, as will be discussed herein,[87] that Congress has in any sense "ratified" the Grace Line action by subsequent enactments.

IV. Sections of The Merchant Marine Act of 1936 Relied Upon by the Agency and the Trial Court As Sources of Agency Authority

All parties to this appeal agree, and the trial court found,[88] that the Agency does have authority to accept total repayment of the construction-differential subsidy, if such repayment is offered. But, as is made amply clear by the argument of parties on this appeal, that is not the issue. The issue here is whether the Secretary has authority to lift permanently the restriction against entry of previously subsidized vessels into the domestic trade in return for such payment.[89]

We cannot assume that it follows as night follows day that if the subsidy is repaid in full, then the operating restriction against entry into the domestic trade must automatically be lifted. We have already set forth above the policy reasons that indicate why this should not be true,[90] and we develop these reasons more fully herein.[91]

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[86] *See* pp. 32-35 & notes 59-72 *supra*.

[87] *See* pp. 49-52 & notes 120-29 *infra*.

[88] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1138.

[89] As the trial court pointed out, repayment of construction-differential subsidy may be made for purposes other than waiver of domestic use restrictions. *See id.* at 1134 n.1a ("permissible" repayment to obtain Title XI financing under 46 U.S.C. § 1274(b)(2) and for permission to engage in trade between foreign countries rather than between United States and foreign countries).

[90] *See* pp. 7-8 *supra*.

[91] *See* Part V *infra*.

But policy arguments aside, for the Agency to take the extraordinary step of removing the restriction on the originally subsidized vessel's operation in the domestic trade to allow competition of that vessel with U.S. ships built without subsidy, the agency must, in our view, find some specific authority in statutory law. The trial judge clearly and appropriately rejected the existence of any such authority, explicit or implicit, in § 506,[92] and he was right. The trial judge then turned to three other sections of the Act[93] to find such Agency authority, and there we think he was wrong.

Curiously, while the Government and the private party appellee here urge that affirmative authority to lift the operational restriction is found in sections 207, 504, and 1104(a)(3) of the Act, the trial court's opinion does not claim to find authority for lifting the restriction in those sections. The trial court said:[94]

> The threshold issue before the Court is whether the Secretary has authority to accept total repayment of . . . [construction-differential subsidy in exchange for the removal of the domestic trade restrictions imposed by section 506 of the Act, 46 U.S.C. § 1156. Resolution of this issue requires this Court to determine first whether the Secretary has the general authority to accept total repayment of . . . [the subsidy] after the subsidy contract has been executed, and second, whether section 506 bars the Secretary from removing domestic trade restriction in exchange for such total repayment.

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[92] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1135 (issue of authority to allow permanent revocation not "address[ed]" by § 506).

[93] *See id.* at 1134 (citing sections 207, 504 & 1104(a)(3) of Merchant Marine Act of 1936).

[94] *Id.* at 1133-34.

The trial court's analysis thus reflects an assumption that accepting total repayment is extricably linked with removal of the domestic trade restriction—an assumption that it contradicts by citing other statutorily "permissible" reasons for which repayment might be made.[95] Though the trial court found no authority in section 506 or the other cited sections to waive domestic trade restrictions, but only to accept repayment of subsidy under "appropriate circumstances,"[96] the court nevertheless resolved that such a waiver was not "addressed" and thus not "precluded" by those sections.[97] The court then sought to justify the waiver by reference to a claimed, long-standing Agency understanding of this right and the "implicit" ratification by Congress of this right in certain amendments passed in 1972.[98] Thus the trial court found little more than an *assumed authority to accept repayment* without discussing, *in relation to the relevant statutory sections, whether this also included authority to lift the domestic trade restriction.*

On this appeal the Government and private party appellees have recognized the distinction by strenuously arguing that an additional legal determination is necessary to their case, *i.e.*, that the three statutory sections *do* affirmatively confer authority to lift the restrictions. In our own analysis, this second finding is necessary to the appellees' case and to support the trial court's judgment; but we do not find such authority in any of the three sections cited, and instead we find that § 506 itself is a positive bar to lifting the restrictions.

We turn now to consider each of those three sections.

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[95] *Id.* at 1134 n.1a.

[96] *See id.*

[97] *Id.* at 1135, 1138.

[98] *Id.* at 1137-39.

A. *Section 504, Title V, of the Merchant Marine Act of 1936 (46 U.S.C. § 1154)*

Section 504 grants to the Agency certain contractual powers: arguably the power both to make and to amend contracts conferring construction-differential subsidies, and the right to include terms which will protect the interest of the United States in subsidy contracts.[99] However, this contractual authority is not so broad as to eliminate restrictions mandated by statutes enacted specifically to protect maritime interests,[100] as the last sentence of § 504 makes unmistakably clear:[101]

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[99] Section 504 of the Merchant Marine Act of 1936, 46 U.S.C. § 1154, provides in pertinent part:

> If a qualified purchaser under the terms of . . . [Subchapter V of the Act, 46 U.S.C. §§ 1151-61] desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may . . . contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid. . . . No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States. . . . The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

[100] As the Appellee Secretary of Commerce concedes, ". . . [Section 504] does not specifically address the question whether the Secretary may later agree to amend the subsidy contract to recoup the subsidy in appropriate circumstances. . . ." Brief for the Secretary of Commerce and Other Federal Appellees at 49. *Accord*, Brief for Alaska Bulk and Trinidad, *supra* note 8, at 13 ("Nothing in section 504 speaks to authorization for the Secretary of Commerce to accept a payback of construction-differential subsidies for any reason. The section confers only authority to pay the subsidy, and says nothing about repayment.").

[101] *See* 46 U.S.C. § 1154 (1970) (emphasis added).

> The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the *lawful or proper use or operation of the vessel, except to the extent expressly required by law.*

Certainly, "lawful or proper use or operation of the vessel" requires conformity with other sections of the Merchant Marine Act, and with other statutes. Specifically, we think such use and operation must be in conformity with § 506.[102] The appellees agree that this language of § 504 refers to, among other provisions, the § 506 domestic trade restriction, but argue that § 506 does not purport to speak to the situation where the subsidy is repaid in full in exchange for an unlimited waiver.[103] As discussed above, we hold that § 506 does contain an implicit prohibition against a waiver unlimited in time.

In short, we find nothing whatsoever in § 504 which would authorize the lifting of the domestic trade restriction of § 506. To the contrary, the reference to "lawful or proper use or operation" refers to the § 506 restriction against entry of a subsidized vessel into the domestic trade.

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[102] This view is reinforced by review of the legislative history of the last sentence of § 504, which was added to the section by amendment in 1951. Reports of both the House and Senate Committees responsible for acting on that amendment stated explicitly: *"Subject to the exceptions contained in section 506 of the 1936 act as to use in domestic trades,* sections 1 and 4 [of the amendments] . . . provide that the lawful or proper use of a vessel constructed with . . . [construction-differential subsidy] may not be restricted." S. Rep. No. 295, 82nd Cong., 1st Sess. 4 (1951); H.R. Rep. No. 2221, 82nd Cong., 2d Sess. 25 (1952) (emphasis added).

[103] *See, e.g.,* Brief for the Secretary of Commerce and Other Federal Appellees at 50.

B. *Section 207, Title V, of the Merchant Marine Act of 1936 (46 U.S.C. § 1117)*

At oral argument, in discussing the statement in the Government's brief that "the Secretary will consider the advisability of issuing proposed guidelines or rules outlining the exceptional circumstances which might justify . . . [permanent waiver of domestic trade restrictions] in the future," [104] Government counsel was asked on what section of the Merchant Marine Act these guidelines and rules would be based. He immediately responded, "Section 207, which gives the Secretary contractual powers . . . ." [105] This was consistent with the position taken in the Government's appellate brief, which cited § 207 as the Agency's basic source of authority to take the action at issue here.[106]

The pertinent part of § 207 states: [107]

> The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be *necessary to carry on the activities authorized by* [. . . *the Merchant Marine Act of 1936*] *or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness,* in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.

We think § 207 is what is commonly called a "housekeeping statute," and a similar provision is found in

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[104] *See id.* at 31.

[105] *See* Statement of Michael Kimmel, *supra* note 32.

[106] *See* Brief for the Secretary of Commerce and Other Federal Appellees at 27-30.

[107] 46 U.S.C. § 1117 (1970) (emphasis added).

nearly every administrative agency basic statute. It is a section which details the means and methods of implementation of specific powers which are granted elsewhere in the statute. It is not an independent grant of power in itself.[108] The authority to make and amend contracts cannot imply the authority to enter into a contract in violation of another section of the same Act or other applicable law, or without a power conferred in another section, just as the power to enter into contracts commonly conferred by corporate charter cannot authorize a corporation to enter into contracts foreign to the purposes of the corporate charter or in violation of law.

In *Dollar* v. *Land*,[109] a case analogous to the present one, this court concluded that § 207 conferred no powers upon the Agency not otherwise specified in the Merchant Marine Act of 1936. In *Dollar* the Maritime Commission

[108] An analogous provision is 15 U.S.C. § 717o (1976), which confers general administrative powers on the Federal Power Commission to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of" the Natural Gas Act, Pub.L. No. 75-688, 52 Stat. 821, 830 (21 June 1938), as amended. Courts have universally held that this provision, which is even more specific in conferring powers on the Federal Power Commission than § 207 of the Merchant Marine Act of 1936 is in conferring powers on the Agency, *see* 46 U.S.C. § 1117, does not enlarge the powers of the Commission conferred elsewhere in the Act. *See, e.g., New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), aff'd, 94 S.Ct. 1151, 415 U.S. 345, 39 L.Ed.2d 383 (1974) (section 717 merely augments existing powers conferred upon Commission by Congress and confers no independent authority to act); *Murphy Oil Corp.* v. *Federal Power Commission*, 431 F.2d 805, 810-11 (8th Cir. 1970) (no enlargement of specific authority of Commission granted in § 717); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740, 742-43 (3d Cir. 1969) (rulemaking procedural requirements not waived by § 717).

[109] 184 F.2d 245 (D.C. Cir. 1950), *cert. denied*, 344 U.S. 806 (1952).

argued that, upon the authority of § 207, it had power to take title to stock of a steamship company. We stated in that case: [110]

> The power to own and operate transoceanic steamship lines is a power of tremendous scope . . . . It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execute contracts.

Similarly, § 207 cannot be a foundation of Agency power to waive statutorily imposed restrictions and thus upset the vital underlying purposes of the Merchant Marine Act, or, indeed, to exercise any power not otherwise granted in the Act or other statute.

C. *Section 1104(a), Title XI, of the Merchant Marine Act of 1936 (46 U.S.C.A. § 1274(a)(3))*

While the Government appellees rely principally upon § 207 as a source of Agency authority, the private party appellees and the trial court rest more strongly upon § 1104(a)(3). The trial court concluded that ". . . [T]he Secretary does in fact possess general authority to accept total . . . [subsidy] repayment in appropriate cases. . . . [T]his authority is expressly contemplated by section 1104(a)(3), 46 U.S.C. § 1274(a)(3). . . ."[111]

The trial court turned to § 1104(a)(3) after finding a "total dearth of guidance from the statutory language and the legislative history [of § 506]," [112] an area in

[110] *Id.* at 249.

[111] *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1134.

[112] *Id.* at 11.

which we have found decisive guidance. Yet § 1104(a)(3) does not deal with the issue of construction-differential subsidy at all. It is not part of Title V, which pertains to such subsidies, but of Title XI, which authorizes Government guarantees of private loans to finance shipbuilding in American yards.[113]

Section 1104(a)(3) was added in 1972 to extend the Agency's authority to make guarantees, and provides that the Secretary:[114]

> . . . may guarantee or make a commitment to guarantee, payment of the principal and interest on an obligation which aids in—
>
> (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to . . . [Title] V of this . . . [Act].

On its face, this provision gives no authority to repay subsidy, much less to lift any statutory operational restrictions. All it does is provide a means for *financing* repayment, if such repayment is otherwise authorized by statute.

How, when, and by what authority subsidy can be repaid must be found in Title V,[115] not Title XI[116] of the Act. Title V provides for two general conditions under which subsidy may be repaid, and both are found in § 506.[117] The 1938 amendment removed any ambiguity in Title V, and there is no conflict between Title V and

[113] *See* 46 U.S.C. §§ 1271-80 (1970) (Federal Ship Mortgage Insurance).

[114] 46 U.S.C.A. § 1274(a) & 1274(a)(3).

[115] 46 U.S.C. §§ 1151-61 (1970).

[116] 46 U.S.C. §§ 1271-80 (1970).

[117] *See* 46 U.S.C. § 1156 (1970).

§ 1104(a)(3) of Title XI. Nothing in Title XI changes the plain meaning of § 506 of Title V.

Underlying the appellees' and the trial court's rationale that somehow the 1972 amendment to Title XI provides authority to perform an act—the permanent waiver of trade restrictions—which is contrary to the implicit prohibition of § 506 of Title V, in spite of the fact that if such authority were granted we would expect to find it in § 506 and nowhere else, is the failure to recognize that there may be reasons for subsidy repayment completely unrelated to domestic trading. A shipowner might choose to repay subsidies in order to be eligible for refinancing up to 87½% of the vessel's cost,[118] or perhaps to escape U.S.-flag requirements as to manning and other U.S. rules of vessel operation.[119] As we have pointed out before, no party here argues that any section of the Merchant Marine Act prohibits the Agency's acceptance of subsidy repayment, but the Agency's power to waive permanently the § 506 domestic trading restriction is quite another matter.

In summary, § 1104(a)(3) reflects only a congressional understanding that subsidy may be repaid, either under § 506 of Title V or for other reasons unrelated to entry into the domestic trade. It says nothing about authority of the Agency to grant trade restriction waivers.

Strangely, however, the argument of appellees and the rationale of the trial court really do not rest upon the language of § 1104(a)(3) as enacted in 1972, but on

[118] *See* 46 U.S.C.A. § 1274(b)(2).

[119] Such relief could be won by gaining permission from the Agency to engage in foreign-to-foreign trade rather than trade between the United States and foreign countries. *See Shell Oil Co.* v. *Kreps, et al., supra*, 445 F.Supp. at 1134 n.1a.

language which was proposed but *never enacted.*[120] An initial draft of this section in 1971 provided for: [121]

> . . . financing, in whole or in part, [of] the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, [ENACTED] in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions. [NOT ENACTED]

It is the above language *which was never enacted* which the appellees and the trial court cite as a source of the Agency's present authority to release subsidized vessels from operating restrictions. They reach this conclusion by citing language in the House Report which commented on the deleted language,[122] and by concluding that the *non*enactment shows that the Agency already had such powers and that the 1964 *Grace Line* action was thereby confirmed by a ~~later~~ Congress. Unfortunately for this singularly convoluted line of reasoning, both the House and Senate disclaimed any intention of so doing.

The language of the House Report relied on by the appellees and the trial court reads as follows: [123]

> In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language [specifying the conditions under which repayment could be accepted and trade restrictions waived]. . . .

[120] *See id.* at 1137; Brief for Seatrain and Polk Tanker, *supra* note 15, at 16-17; Brief for Secretary of Commerce and Other Federal Appellees at 43-45.

[121] H.R. 9756, 92d Cong., 1st Sess., § 3 (1971).

[122] H.R. Rep. No. 92-688, 92d Cong., 1st Sess. (1971).

[123] *Id.* at 10.

There are several points vitiating the reliance of the appellees and the trial court on this language. First, it is clear that the Committee regarded the *Grace Line* case as a "very special circumstance[e]" and "an unusual situation," [124] and chose the path of leaving such matters entirely to the courts rather than enshrining any principle in general legislation. So the Congress specifically declined to adopt the Agency's *Grace Line* action as a general principle. As aptly stated by one appellant here, "The most that can be said about the . . . [intent of Congress in 1972 is that it] declined to commit itself on the issue." [125]

Second, the language of § 1104(a)(3) refers specifically to subsidy repayments under Title V.[126] Yet the only types of domestic trade restriction waivers authorized calling for subsidy repayments under Title V are

[124] *See id.*

[125] *See* Brief for Alaska Bulk and Trinidad, *supra* note 8, at 27.

[126] *See* 46 U.S.C.A. § 1274(a)(3) (providing for ". . . financing [of] . . . the repayment . . . of construction-differential subsidy paid . . . pursuant to . . . [Title V]. . . .").

those cited in § 506, which are limited to certain world voyages embracing ports in the U.S. coastwise trade and to temporary periods not to exceed six months.[127]

Third, and most importantly, the House Committee Report quoted above contains a sentence following the portion quoted and relied upon by the trial court, which the trial court omitted. That sentence reads: "This paragraph [§ 1104(a)(3)] in Title XI does not in any way extend or affect the application of Title V of the Act."[128] The Senate Report contained the same language omitted by the trial court:[129]

> Paragraph (3) [of § 1104(a)] is new. This paragraph would permit the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. *This paragraph in Title XI does not in any way extend or effect the application of Title V of the Act.*

Nothing whatever was said in the Senate Committee report about the *Grace Line* matter or authorizing waiver of domestic trade restrictions.

The bottom line of the legislative history of § 1104(a)(3) in both House and Senate is clear: "This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." We think that no inference of reaffirmed or expanded waiver authority can be drawn from either the congressional action or the Reports with regard to § 1104(a)(3). Congress plainly refused to ratify the *Grace Line* action or to permit

[127] *See* 46 U.S.C. § 1156 (1970).

[128] H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 10 (1971).

[129] S. Rep. No. 92-1137, 92d Cong., 2d Sess. 9 (1972) (emphasis added).

the enactment of § 1104(a)(3) to change Title V as the statutory section determining exclusively the circumstances under which subsidy can be repaid in exchange for a lifting of trade restrictions.

V. Policy of the Merchant Marine Act of 1936

In *Sea-Land Service, Inc.* v. *Kreps*,[130] a case involving the award of operating-differential subsidy under Title VI of the Merchant Marine Act of 1936,[131] we indicated that when "[t]he relevant statutory language provides no direct guidance in resolving . . . [a] dispute" over that statute's proper application, both the Agency and the reviewing court "must of necessity look to the *purposes* underlying the particular statutory provision and the Act in general . . . ."[132] It should be clear that in the present case we believe there is much guidance to be derived from the language of the statute itself, particularly § 506 of Title V. In addition to this, we now turn to consider whether the Agency's interpretation of the statute on which its action in the instant case is based will in the long run further the purposes of the legislation in a reasonable and sound manner.

We believe there is risk of harm to the overall and long-term policies of the Merchant Marine Act in sustaining the Agency action here. The policy of the Act is to create a protected area of purely American shipbuilding and ship operation in the domestic coastwise trade. This is accomplished by excluding all foreign-built or foreign-operated vessels from this trade. The American shipowner and shipbuilder then knows that he must compete only with like-situated American shipowners and shipbuilders, and he can adjust his sights

[130] 566 F.2d 763 (D.C. Cir. 1977).

[131] 46 U.S.C. §§ 1171-83a (1970).

[132] *Sea-Land Service, Inc.* v. *Kreps*, *supra*, 566 F.2d at 773.

accordingly. On the basis of known economic facts, the builder or operator makes his calculations of the market and of competition, in which the Government plays no direct part, except in administering guarantees of construction loans available equally to all.

The American shipowner and shipbuilder competes in foreign trade on an entirely different economic footing. To compete with foreign shipping, the American builder and operator are able to secure up to 50% of a ship's construction costs from the U.S. Government. The purpose of this policy is to enable the American operator to compete initially with foreigners on an equal basis of cost per ship, and to sustain the viability of American shipyards. The American operator is further aided by an operational-differential subsidy, which compensates him for the recognized extra cost of American crews. The American shipbuilder and operator know the competitive factors present in the foreign trade, and they are assisted by U.S. Government funds in meeting foreign competition.

Given these two completely separate competitive areas, unsubsidized American vessels have always operated in the protected, Jones Act domestic trade, while subsidized American vessels, in accord with the restriction of § 506, have always operated in the foreign trade.[133] To permit a ship heavily subsidized in its construction cost to compete with unsubsidized U.S.-built ships is to introduce into the domestic portion of our maritime trade a totally variable and incalculable factor. While the Government may feel that it should be able to take whatever action is necessary to free itself of its unfortunate financial obligations here, and though indeed there may be public (but not maritime) policy arguments strongly in its favor, yet the transfer of, first, the *Stuyvesant* and pos-

[133] The two Grace Line vessels may be the only possible exceptions. *See* pp. 32-39 & notes 59-36 *supra*.

sibly later of the Bay Ridge[134] into the domestic trade would inevitably have a depressive impact on the future of American shipbuilding and ship operation by American owners. To accomplish a short-term Government goal, the actions of the Agency here would imperil a carefully conceived, long-established, and far-sighted maritime policy of the United States.

Conclusion

We find the Agency's action unauthorized by any applicable statute, prohibited by § 506 of the Merchant Marine Act of 1936, and contrary to the overall congressional policy expressed in the structure of that Act. The decision of the District Court is reversed, and the case is remanded to the District Court with instructions to enter an appropriate order granting the plaintiff-appellants the relief requested.

Reversed and Remanded.

[134] The *Bay Ridge* was under construction in the Brooklyn Naval Yard at the same time as the *Stuyvesant*. *See* Brief for the Secretary of Commerce and Other Federal Appellees at 15-16.

BAZELON, *Circuit Judge, dissenting*: Although the majority gives a plausible account of the statutory framework governing this case, I am persuaded that nothing in the Merchant Marine Act precludes the Secretary from waiving domestic trading restrictions in return for total repayment of subsidy. In my view, the Secretary had ample authority to enter into the contractual modification at issue in this case, and in exercising that authority she did not abuse her discretion. I therefore respectfully dissent from the decision to reverse the district court.

I.

I cannot agree that the 1938 Amendments to the Merchant Marine Act of 1936 "unmistakeably manifested" [1] Congress' intention to preclude total repayment of the construction differential subsidy in return for a permanent waiver of the domestic trading restrictions contained in § 506 of the Act. The Report of the House Committee on Merchant Marine and Fisheries observed that "[n]o fundamental change . . . has been effected" in § 506 by the 1938 Amendments.[2] The original version of § 506 was part of Congress' effort to strengthen the American built and operated "foreign-going" fleet through the creation of a "construction differential subsidy," which replaced the much abused "ocean mail contract subsidy" program. One of the principal failures of the ocean mail subsidy was the diversion of subsidy payments from foreign to domestic service, providing the subsidized operators an unfair advantage over the unsubsidized, "Jones Act" operators.[3]

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[1] Majority Op. at 28.

[2] H.R. REP. No. 2168, 75th Cong., 3d Sess. 21 (1938).

[3] *See*, Preliminary Report of the Special Committee of the Senate to Investigate Air Mail and Ocean Mail Contracts. S. REP. No. 898, 74th Cong., 1st Sess. 1933.

The 1936 Act eliminated much of the unfair competition by restricting the conditions under which a ship built with a construction subsidy could engage in the domestic trade. At the heart of the original § 506 was the requirement that owners of subsidized vessels must repay a portion of the construction differential subsidy corresponding to the remaining economic life of the vessel in order to engage in direct competition with the unsubsidized, Jones Act fleet.[4]

The remaining text of § 506, however, introduced a central ambiguity into the operation of the section, an ambiguity that led to the 1938 amendment.[5] The original § 506 could be read to permit permanent waiver of the domestic trade restrictions, contingent on proportional

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[4] P.L. 74-835, 40 Stat. 1999 (1936), the original § 506 provided *inter alia*:

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

[5] *See* note 3, *supra*.

repayment of subsidy, as well as "emergency" temporary waiver of restrictions without the need to pay back any of the construction differential subsidy. Alternatively, the section could be read to permit only temporary waivers, coupled with the requirement of payback.

As Judge Wilkey notes, the former is the more plausible interpretation of the original § 506.[6] Accordingly, the "original purpose" of § 506 included the possibility of permanent waiver so long as the source of unfair competition, the previously granted construction differential subsidy, was eliminated. In contrast, the ability to secure emergency temporary waivers without the required payback of subsidy did provide operators of subsidized vessels a significant advantage over their Jones Act competitors. It therefore seems likely that Congress was addressing this latter situation when clarifying the "original purpose" of § 506. Congress clearly eliminated the temporary waiver advantage, since the amended § 506 clearly requires a payback of subsidy for even temporary transfers.

Nonetheless, it is undeniable that in eliminating the 3-month temporary transfer for which no subsidy need be repaid, Congress also eliminated from § 506 the language that appeared to authorize permanent transfer from foreign to domestic service. Despite its expressed intention not to alter the "original purpose" of the section, the House Report stated:

> The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. . . . If the vessel is used, with the consent of the Commission, in the domestic trade in services other than those

[6] Majority Op. at 24.

> enumerated, *the obligations of the owner to repay part of the subsidy are clearly defined.*[7]

The clearly defined obligation of the amended § 506 includes partial, but not permanent repayment of subsidy. Yet nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938.[8]

II.

In 1964, the Comptroller General issued his decision in *Grace Line*[9] upholding the Secretary of Commerce's au-

[7] H.R. REP. No. 2168, *supra*, note 2, at 21 (emphasis added).

[8] Compare Majority Op. at 29. The discussion of the amendment to § 506 was sparse. In addition to the above-discussed House Report, reference to the amendment was limited to: 1) a brief similar comment in the Senate Report, S. REP. No. 1618, 75th Cong., 3d Sess., 12-13 (1938), *quoted in pertinent part* in Majority Op. at 27 n.52; 2) the comment of Maritime Commission Chairman Joseph P. Kennedy in introducing the 1938 Amendments, *see Amending Merchant Marine Act, 1936, hearings on H.R. 8532 before the House Committee on Merchant Marine and Fisheries*, 75th Cong., 2d Sess. 8 (1938) *quoted in* Majority Op. at 25-27; and 3) the testimony of E. M. Bull (president of an unsubsidized carrier), *id.* at 251-258; John T. Corbett (representing the Brotherhood of Locomotive Engineers), *id.* at 571-72; and Edgar F. Luckenbach (president of an unsubsidized carrier), *id.* at 105-06. Although none of the comments can be fairly characterized as resolving the question before this court, it is instructive that the comments of the unsubsidized operators, Bull and Luckenbach, generally criticized the amendments as extending rather restricting the right of subsidized operators to compete with the unsubsidized vessels. The failure of these witnesses to comment favorably on the apparent elimination of the right to transfer permanently may be some indication that eliminating the permanent waiver was not intended. Alternatively, their failure to address permanent transfer may suggest that the prospect of a permanent waiver accompanied by repayment of subsidy was not viewed as a threat to domestic, unsubsidized carriers. It is clear from the testimony that the principal concern of the unsubsidized operators was the ability of subsidized ships to move back and forth between foreign and domestic service, enjoying the benefits of subsidy on their foreign voyages and entering the domestic service only on the choicest routes and occasions. Permanent transfer does not pose similar problems.

[9] 44 Comp. Gen. 180 (1964).

thority to remove domestic trading restrictions in return for repayment of the unamortized construction differential subsidy. Although there are some factual differences between the present case and *Grace Line*, I do not believe that they are material to the question of the Secretary's authority, since the action taken in *Grace Line* was not contemplated by the express language of § 506 any more clearly than the present action of the Secretary.

I find the Comptroller's rationale in *Grace Line* questionable. The Comptroller's reasoning began with the observation that ships built with subsidy would be permitted to engage in domestic activities without restriction once the subsidy had been fully depreciated. In the Comptroller's view, this represented a congressional judgment that when the unfair advantage created by the subsidy terminated, the reasons for the restriction would expire, thus justifying unrestricted domestic trading by previously subsidized vessels. Applying the same reasoning to an "accelerated amortization" through repayment, the Comptroller concluded that the purpose of the restrictions would lapse upon repayment, and the Secretary could then permit domestic trading, consistent with the Act.

The difficulty with this argument is that the statute explicitly contemplates a subsidized ship entering unrestricted domestic trade after the economic life of the subsidized vessel had expired, without any further repayment of subsidy.[10] In contrast, no such explicit provisions governs "accelerated" amortization.

Although *Grace Line* thus does not stand as well-reasoned precedent, it is precedent nonetheless, and appel-

[10] P.L. 88-225, 77 Stat. 469 (1963), 46 U.S.C. § 1125 (note) (1970), amended the basis for computing the amount of subsidy to be repayed pursuant to § 506. Application of that formula yields a zero repayment once the subsidy has been fully depreciated.

lees argue that subsequent congressional actions represent ratification of at least the result in *Grace Line*.

In 1970, Congress enacted a number of amendments to the Merchant Marine Act designed to promote American ship-building for the foreign trade, but § 506 was left intact.[11] However, Congress' failure to amend § 506 under those circumstances cannot be viewed as a ratification of *Grace Line*, since the issue of transfer from the foreign to domestic trade was not germane to the principal focus of the Amendments.

A stronger case can be inferred from Congress' amendment in 1972 of § 1104 of the Merchant Marine Act.[12] As introduced, the new § 1104(a)(3) clearly contemplated the release of the domestic trading restrictions in return for full repayment of subsidy. The House Committee however, deleted the explicit reference to repayment in return for lifting the trading restrictions, observing:

> In the entire history of the administration of the 1938 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your committee questions the desirability of general legislation to deal with such an unusual situation and feels that Title XI assistance should be extended in all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your committee therefore has amended the legislation by deleting the language.[13]

[11] Merchant Marine Act of 1970, P.L. 91-469, 84 Stat. 1018 (1970).

[12] Federal Ship Financing Act of 1972, P.L. 92-507, 86 Stat. 909 (1972).

[13] H.R. REP. No. 72-688, 92d Cong., 1st Sess. 9-10 (1971).

There are three items of note in the quoted passage. First, Congress showed a clear awareness of the *Grace Line* precedent. Second, by characterizing the purpose of the language so as "to include" partial repayments, Congress intended that other types of repayment might occur.[14] Finally, Congress indicated that the enactment of § 1194(a)(3) was not, in its view, an alteration of Title V. Thus, whether or not such repayments were intended must be gauged by the Act as it stood prior to 1972. But in judging what restrictions Title V imposed prior to 1972, we must take into account Congress' awareness of *Grace Line* as an interpretation of Title V.

I have little doubt that in enacting the 1972 Amendments the House Committee clearly contemplated the use of § 1104(a)(3) loans for precisely the sort of repayment of subsidy at issue in *Grace Line* and here, albeit with the expectation that full repayment would be rare. There is no note of disapproval in the House Committee's discussion of *Grace Line*. A fortiori, the House Committee must have believed the Secretary had the *authority* to accept repayment in return for waiving domestic trading restrictions, and that Title V posed no barrier to such an arrangement.

III.

This result is perfectly consistent not only with the overall purposes of the Act (fostering the development of a U.S.-flag, U.S.-built merchant marine) but is equally consistent with the purpose of the trading restrictions

[14] Admittedly, the fact that full repayment was contemplated by the 1972 amendments is not in itself sufficient to establish Congressional approval of removing domestic trading restrictions in return for that repayment. There are other reasons why an operator might seek to repay the subsidy. For example, the operator might seek the right to engage in foreign-to-foreign, rather than foreign-to-U.S. trade, with the attendant relief from U.S. flag requirements. Alternatively, repayment of subsidy would make the operator eligible to secure financing of up to 87½% of the cost of the vessel.

imposed by § 506. Unlike the temporary transfers, a permanent transfer does not allow the vessel's operator to take advantage both of the benefits of subsidy in foreign trading, and the protection of the Jones Act in domestic trading. Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator.[15] The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as whole, to protect Jones Act operators from this type of competition.[16]

The fact that the 92nd Congress thought that § 506 did not preclude removal of domestic trading restrictions in return for full repayment does not conclusively

[15] To the extent that the Secretary did not require a repayment of subsidy *with interest*, the owners of the STUYVESANT did receive an unfair advantage. Accordingly, I would modify the decision of the district court to require the amount of repayment to include interest on the subsidy.

[16] This raises an interesting question of appellants' standing to challenge the Secretary's decision. The issue of standing is not addressed in Judge Wilkey's opinion. I take it that the only "injury in fact" which appellants can allege is the harm from additional competition. Although I believe this is an adequate basis for appellants' standing, *see* Ass'n of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150 (1970), it demonstrates that appellants are concerned primarily with insulating their vessels from competition. Although the nation's merchant marine policy does shield domestic carriers from competition by foreign built vessels, as well as from unfair competition by subsidized vessels, it was not intended to limit the competition among American built, unsubsidized vessels. Appellant Shell argues that "[p]ersons planning to construct unsubsidized vessels must be able to assess future vessel supply in the legislatively protected domestic market." Reply Br. for Shell at 3. This mischaracterizes the protection created by the Jones Act and § 506, since the builder of an unsubsidized vessel has no way of knowing how many other unsubsidized vessels might be built in the future.

end our inquiry. Although the views of subsequent Congress' are entitled to significant weight, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974), where the intent of the enacting Congress is unmistakable, it is the latter that controls, unless expressly overriden by the positive act of a later Congress. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n. 39 (1977). The difficulty posed by this case is, on the one hand, the original intent is not unmistakable (as in *Teamsters*) but, on the other hand, the intention of the later Congress was not embodied in legislation directly affecting the ambiguous provision, that is, Title V.

Although the matter is not free from doubt, I would affirm the decision of the district court, subject to the qualification expressed in note 15, *supra.*[17] My conclusion is buttressed by the language in both §§ 501 and 504 of the Act, 46 U.S.C. §§ 1151 and 1154 (1970), that "[t]he contract of sale . . . shall not restrict the lawful or proper use or operation of the vessel except to the extent *expressly* required by law." (emphasis added) Taking all the relevant guides to interpretation together, I cannot say that the Secretary's interpretation is unreasonable. *See Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), nor that there are "compelling indications" that her interpretation is wrong, *see E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Columbia*

[17] Assuming that § 506 does not *preclude* full repayment of subsidy in return for removing domestic trading restrictions, I believe the Secretary has the authority, pursuant to § 207 of the Act, 46 U.S.C. § 1117 (1970) to amend the contract to remove the domestic trading restrictions. The Secretary has recognized that her discretion to do so is not unlimited, *see* the Secretary's proposed rule, *Construction-Differential Subsidy Repayment, Total Repayment Policy*, 43 Fed. Reg. 51045 (1978) (to be codified in 46 C.F.R. § 276.3), and must be exercised consistent with the overall purposes of the Act.

Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 121-22 (1973).

Despite the statement of counsel for the Secretary at oral argument, I do not believe the question of whether the Secretary must make a finding of necessity for a full repayment is relevant to the Secretary's authority to accept such repayment, since full repayment is not expressly covered by 506.[18] A finding of need is mandated by § 506 for *partial repayment* and *temporary transfer*. This is consistent with a concern that subsidized carriers not take unfair advantage of unsubsidized carriers simply to skim off the most lucrative domestic trade and return at will to foreign service. In contrast, full repayment places the formerly subsidized carrier on an equal footing with the other vessels in the Jones Act fleet, and the possibilities of abuse are thereby eliminated. Nonetheless, the Secretary cannot arbitrarily agree to accept repayment, but rather must provide a reasoned basis for that action. The circumstances of this case provide ample support for the Secretary's discretionary decision to accept repayment.

[18] Compare Majority Op. at 16-19.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

No. 77-2080

ALASKA BULK CARRIERS, INC., TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, SECRETARY OF COMMERCE, U. S. DEPARTMENT OF COMMERCE, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

(Filed March 22, 1979)

BEFORE: BAZELON, MCGOWAN, and WILKEY, *Circuit Judges*

ORDER

Upon consideration of the petitions for rehearing filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the petitions for rehearing.

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And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

(Filed March 22, 1979)

BEFORE: WRIGHT, *Chief Judge*; BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*

ORDER

Upon consideration of the suggestions for rehearing *en banc* filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), having been transmitted to the full Court and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the suggestions for rehearing *en banc*.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS et al.,
Defendants.

ALASKA BULK CARRIERS, INC., and
TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS et al.,
Defendants.

Civ. A. Nos. 77-1645, 77-1647

Nov. 22, 1977

As Corrected March 6, 1978

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

These consolidated cases are presently before the Court on cross-motions for summary judgment.[1] Plaintiffs herein, Shell Oil Company (Shell), Alaska Bulk Carriers,

[1] Defendants and defendant-intervenors have, in the alternative, moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. However, because the Court has considered matters outside the pleadings, the Court has, pursuant to the last sentence of Fed.R.Civ.P. 12(b), treated defendants' and defendant-intervenors' motions solely as motions for summary judgment pursuant to Fed.R.Civ.P. 56.

Inc. (Alaska Bulk), and Trinidad Corporation (Trinidad), seek judicial review of certain actions taken by the defendants, Juanita M. Kreps, Secretary of Commerce, the Maritime Administration (MarAd), Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, and the three members of the Maritime Subsidy Board (MSB). The actions challenged relate to the Secretary's decision to remove domestic trading restrictions from the ship known as the S. S. STUYVESANT in exchange for the repayment of a construction-differential subsidy (CDS) of some $27.2 million by the Polk Tanker Corporation (Polk), the owner of the STUYVESANT and a wholly-owned subsidiary of Seatrain Lines, Inc. Polk and Seatrain Shipbuilding Corporation (Seatrain Shipbuilding), the builder of the STUYVESANT and another wholly-owned subsidiary of Seatrain Lines, Inc., were permitted to intervene herein as party-defendants.

The cross-motions for summary judgment now before the Court present four legal issues: (1) whether the Secretary has the legal authority under the Merchant Marine Act of 1936 to remove domestic trading restrictions upon the operation of a vessel built with CDS in exchange for repayment in full of the CDS; (2) if the Secretary has such legal authority to remove domestic trading restrictions, whether she has the legal authority to accept as repayment therefor a promissory note payable over 20 years; (3) whether the procedures utilized by the Secretary in taking the actions here in issue deprived plaintiffs of property in violation of the Due Process Clause of the fifth amendment; and, finally, (4) whether the Secretary's decision to exercise such authority on the facts of the instant case was arbitrary and capricious or otherwise violative of the Administrative Procedure Act (APA).

For the reasons hereinafter stated in sections III and IV, *infra*, the Court concludes that the Secretary has the

legal authority both to remove permanently domestic trading restrictions from a CDS vessel in exchange for CDS repayment and to accept a 20-year promissory note as repayment. The Court further concludes that the procedures utilized by the Secretary did not deprive plaintiffs of any property interest cognizable under the Due Process Clause. Accordingly, the Court will grant defendants' and defendant-intervenors' motions for summary judgment as to these issues. However, for the reasons set forth in section V, *infra*, the Court concludes that the Secretary failed to consider relevant factors in making her decision to take the actions herein challenged, and the Court therefore concludes that these actions are arbitrary and capricious and an abuse of discretion, within the meaning of section 10(e) of the APA, 5 U.S.C. § 706(2)(A). Accordingly, the Court will grant plaintiffs' motion for summary judgment on this issue, and will remand this matter to the Secretary for further consideration in accordance with this opinion.

I. STATUTORY FRAMEWORK

Title V of the Merchant Marine Act of 1936, (the Act), *as amended*, 46 U.S.C. §§ 1151 *et seq.*, empowers the MSB to award a "construction-differential subsidy" (CDS) to persons building new vessels for use in the "foreign commerce of the United States." 46 U.S.C. § 1151(a). Such a subsidy is intended to equalize the costs of vessel construction between United States and foreign shipyards, where construction costs are lower as a result of lower labor and material costs and/or foreign government subsidies. The CDS program thus enables ships built in the United States to compete in charter rates against foreign-built ships. *See generally Moore-McCormack Lines, Inc.* v. *United States*, 413 F.2d 568, 188 Ct.Cl. 644 (1969).

No such CDS, however, is necessary for ships not in competition with foreign-built ships. Section 27 of the

Merchant Marine Act of 1920, *as amended*, 46 U.S.C. § 883, provides that only vessels "*built in* and documented under the laws of the United States and owned by persons who are citizens of the United States" may engage in domestic trade—trade "between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwide laws." (Emphasis added.) *See American Maritime Association* v. *Blumenthal*, No. 77-1508 (D.D.C. October 14, 1977). Since no foreign-built ships can compete in domestic trade with the higher-cost United States-built ships, no CDS may be paid to United States ships engaged in domestic trade.

In order to protect the unsubsidized vessels, United States ships that are built with the aid of CDS are prohibited from engaging in domestic trade since they are able to offer lower charter rates than unsubsidized United States ships. This prohibition, codified in section 506 of the 1936 Act, 46 U.S.C. § 1156, is the focal point of this litigation. This section, quoted in its entirety in section III(b) *infra*, requires recipients of CDS to agree not to operate the subsidized vessel in domestic commerce, though it does provide a mechanism whereby the Secretary can waive such domestic trading restrictions for up to six months per year in exchange for a *pro rata* repayment of CDS.

One final statutory provision of relevance to this case is Title XI of the Act, 46 U.S.C. §§ 1271 *et seq.*, which authorizes the Secretary to provide loan guarantees for the financing of United States-built vessels. Section 1104(a)(3) of the Act, 46 U.S.C. § 1274(a)(3), authorizes the use of such guarantees for the "financing, in whole or in part, [of] the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of the Act." Other subsections of section 1104(a) set forth other types of financing for which loan guarantees may be made. Section 1104(b)(2) provides that such financing may not exceed 87.5 percent of the cost of vessels constructed without CDS and may not exceed 75 per cent of the cost of vessels constructed with CDS.

II. FACTUAL BACKGROUND

On June 30, 1972, the MSB executed CDS contracts with intervenors Seatrain Shipbuilding and Polk for a 225,000 deadweight ton (DWT) tanker now known as the STUYVESANT. Pursuant to Board Contract Nos. MA/MSB-164 and MA/MSB-165, the MSB agreed to pay CDS funds to Seatrain Shipbuilding, and Polk, as the vessel purchaser, agreed to operate the STUYVESANT in the foreign trade of the United States, as required by section 506 of the Act.

Pursuant to the CDS contracts, Seatrain received $27.2 million in construction subsidies for the STUYVESANT which represents approximately 26 per cent of the total construction cost of some $102.7 million. In addition, pursuant to Title XI of the Act, the Secretary guaranteed some $30.2 million in loans. Finally, the Economic Development Administration (EDA), another agency of the Department of Commerce, made loans of $5 million and guaranteed, to the extent of 90 per cent, approximately $82 million in additional loans to Seatrain Shipbuilding for the purpose of developing and maintaining the shipbuilding facilities of the former Brooklyn Navy Yard.

Construction of the STUYVESANT was completed in 1977. Efforts by Polk to find employment for the STUYVESANT in the foreign trade of the United States proved unavailing as a result of an excess supply of tanker tonnage in foreign trade and other factors influencing the volume of such foreign trade. As a result, Polk sought other employment opportunities for the STUYVESANT and began negotiations with the Stand-

ard Oil Company of Ohio [(SOHIO)] for the transportation of SOHIO's Alaskan oil to the continental United States. These negotiations culminated on June 21, 1977, in an agreement between Polk and SOHIO for a three-year time charter of the STUYVESANT provided that the vessel became qualified to engage in domestic trade.

On July 8, 1977, in order to so qualify the STUYVESANT for carrying SOHIO's Alaskan oil in domestic trade, Polk filed with the Assistant Secretary of Commerce for Maritime Affairs (hereinafter, MarAd/MSB) an application seeking waiver of the domestic trade restrictions of section 506 for a three-year period in exchange for a *pro rata* repayment of CDS. MarAd/MSB assigned the application Docket No. S-565, and notice of the application was published in the Federal Register on July 19, 1977. 42 Fed.Reg. 37,229 (1977). Plaintiffs Shell and Alaska Bulk and others filed comments in opposition to Polk's application, and Polk subsequently withdrew the application on August 26, 1977.

On August 25, 1977, Polk had filed a second application with MarAd/MSB. This application requested the Secretary and her designees to amend the CDS contract with Polk to permit Polk to repay in full the CDS already paid for the STUYVESANT in exchange for the removal of the section 506 domestic trading restrictions to which Polk had agreed. As stated in Polk's August 25 application itself, the purpose of this requested "[c]ancellation of the Title V contract" was to "permit the operation of the Vessel in the Alaska (domestic) trade without further permission from the United States." Exhibit D, Stipulation of Undisputed Facts, at 1. This application by Polk was not published in the Federal Register.

On August 30, 1977, MarAd/MSB took a series of actions with respect to the August 25, 1977, application of Polk; these actions are set forth in two letters dated

August 31, 1977, from MarAd/MSB to Polk and Queensway Tanker, Inc. In these letters, MarAd/MSB agreed, *inter alia*, to release the STUYVESANT permanently from section 506 domestic trading restrictions in exchange for Polk's repayment of the $27.2 million CDS by means of a 20-year interest-bearing promissory note secured by a third preferred ship mortgage on the vessel. In addition, MarAd/MSB approved the following transactions and attendant sale of Title XI-guaranteed bonds, which were in fact consummated on September 30, 1977. At closing, Polk transferred the STUYVESANT to the United States Trust Company (USTC) as owner-trustee for the equity-owner, General Electric Credit Corporation (GECC) and the above-described collateralized promissory note to the Secretary for $27.2 million as repayment for the full amount of CDS. The note was then transferred to USTC which assumed responsibility for $60.2 million of government-insured indebtedness on the STUYVESANT. Of that amount, $31.3 million is indebtedness incurred at the closing through the sale of bonds. The proceeds of these bonds was then used to repay loans of $28 million guaranteed by the Economic Development Administration. USTC also paid Polk $32.6 million, which was placed in an escrow account for the benefit of the equity-owner, GECC. USTC then bareboat-chartered the STUYVESANT to Queensway Tankers, Inc., which in turn time-chartered the vessel to SOHIO for three years for the purpose of transporting Alaskan oil to the continental United States.

The above-described transactions, of which the Secretary's decision to remove domestic trading restrictions upon the STUYVESANT was an integral part, were originally scheduled for closing on September 23, 1977. But on September 22, 1977, plaintiffs filed these suits and sought a temporary restraining order (TRO) to prevent the scheduled closing. The parties appeared before Judge Gasch on that date, and he granted the requested

TRO and scheduled the hearing on plaintiffs' motion for a preliminary injunction for September 29, 1977, before this Court.

On September 29, 1977, this Court heard extensive arguments on plaintiffs' motion for preliminary injunctive relief. Upon consideration of these arguments and the parties' comprehensive memoranda, and based on its consideration of the four factors enunciated in *Virginia Petroleum Jobbers Association* v. *FPC*, 104 U.S.App. D.C. 106, 259 F.2d 921 (1958), the Court found that plaintiffs had failed to demonstrate that they would incur immediate and irreparable injury if the requested relief were denied. The Court therefore, on September 30, 1977, denied plaintiffs' motion for a preliminary injunction. Thereafter, on that same day, the financial transactions involving the STUYVESANT were closed. Since that time, the parties have engaged in extensive and expedited discovery, and, as a result, they have filed the instant cross-motions for summary judgment.

III. THE SECRETARY OF COMMERCE HAS AUTHORITY UNDER THE MERCHANT MARINE ACT OF 1936 TO ACCEPT TOTAL REPAYMENT OF CONSTRUCTION-DIFFERENTIAL SUBSIDY AND TO WAIVE PERMANENTLY DOMESTIC TRADING RESTRICTIONS IN EXCHANGE FOR SUCH REPAYMENT.

The threshold issue before the Court is whether the Secretary has authority to accept total repayment of CDS in exchange for the removal of the domestic trade restrictions imposed by section 506 of the Act, 46 U.S.C. § 1156. Resolution of this issue requires this Court to determine first whether the Secretary has the general authority to accept total repayment of CDS after the subsidy contract has been executed and second, whether

section 506 bars the Secretary from removing domestic trade restrictions in exchange for such total repayment.

A. *The Secretary's General Contractual Authority*

All parties appear to be in agreement that the Secretary possesses a "general authority" to accept total repayment of CDS. Thus, plaintiffs Alaska Bulk and Trinidad state unequivocally that they "have no quarrel with [the acceptance of] total CDS repayment" as long as such acceptance is not accompanied by a removal of domestic trade restrictions.[1a] None of the parties, however, has pointed to any particular statutory provision(s) that expressly authorizes the Secretary to accept total CDS repayment under any circumstances.

Defendants and defendant-intervenors have asserted that this power is *inherent* in sections 504, 1104(a)(3), and 207 of the Act, 46 U.S.C. §§ 1154, 1274(a)(3), & 1117, and in section 105(1) of the Reorganization Plan No. 21 of 1950 [Plan 21], 64 Stat. 1273 (1950), and section 202(b)(1) of Reorganization Plan No. 7 of 1961 [Plan 7], 75 Stat. 840 (1961). While plaintiffs admit, as indicated above, that the Secretary has such inherent authority to accept total CDS repayment except when such repayment is barred by another provision of the Act, they express neither agreement nor disagreement with the provisions relied upon by defendants and defendant-intervenors.

The Court has carefully analyzed the provisions invoked by defendants and defendant-intervenors. On the

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[1a] Reply Memorandum of October 20, 1977, at 5 n.5. Plaintiff Shell adopts this same position in its Memorandum of October 13, 1977, at 24 n.*. As two examples of "permissible" CDS repayment, plaintiffs cite: (1) CDS repayment for the purpose of obtaining 87½% Title XI financing under 46 U.S.C. § 1274(b)(2), rather than 75% financing; and (2) CDS repayment for the purpose of obtaining permission to engage in foreign-to-foreign trade, rather than trade between the United States and foreign countries.

basis of this analysis, the Court concludes that the Secretary does in fact possess general authority to accept total CDS repayment in appropriate cases. The Court agrees with defendants and defendant-intervenors that such authority is inherent in the Secretary's broad contractual authority provided by sections 504 and 207, 46 U.S.C. §§ 1154 and 1117. The Court further agrees that this authority is expressly contemplated by section 1104 (a) (3), 46 U.S.C. § 1274(a) (3), which provides that the Secretary

> may guarantee or make a commitment to guarantee, payment of the principal and interest on an obligation which aids in—
>
> > (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to [Title V].

Finally, the Court also finds that the two reorganization plans cited by defendants and defendant-intervenors demonstrate that the Secretary of Commerce has authority not only for making Title V [CDS] subsidy contracts, but also, in the words of section 105(1) of Plan 21, for "amending and terminating [such] contracts." While these reorganization plans cannot be interpreted to "authoriz[e] an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress," 5 U.S.C. § 905, they nevertheless demonstrate (1) that the Secretary's broad contractual authority with respect to CDS contracts has been construed expansively, and (2) that Congress was aware of, and approved, at least implicitly, such an expansive construction. For these reasons, the Court holds that the Secretary has authority to accept total CDS repayment under appropriate circumstances.

B. *The Effect of Section 506*

Plaintiffs contend that, notwithstanding any general authority which the Secretary may have, section 506 precludes any removal, or waiver, including a permanent one, of domestic trade restrictions *except* for the six-month waivers expressly authorized by this section. Section 506 provides:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic Coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. *The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter.* Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which

> bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

(Emphasis added.)

Plaintiffs have argued at substantial length that both the express language of section 506 and the legislative history of both its original 1936 version and its amended 1938 version, as well as the express language of section 501, demonstrate that Congress intended for CDS contracts to be irrevocable and that the *only* means by which ships built with CDS could ever engage in domestic trade is a six-month temporary waiver as expressly provided by section 506. The Court's own review of the pertinent statutory language and legislative history, however, leads the Court to conclude otherwise. While both the statutory language and the legislative history amply support the conclusion that the Secretary's authority with respect to *temporary* waivers of domestic trading restrictions is limited to six-month periods, *nothing* in section 506, in any other provision of Title V, or in the legislative history of these provisions either expressly or implicitly addresses the issue of *permanent* revocation of a CDS contract.

In view of this total dearth of guidance from the statutory language and the legislative history, it is necessary for the Court to consider other indicia of legislative intent to determine whether section 506 was intended to preclude the Secretary from permanently waiving domestic trading restrictions in exchange for CDS repayment. As the Court of Appeals for this Circuit recently indicated in a case involving the award of operating-differential subsidies (ODS) under another title of the Merchant Marine Act of 1936, "when there is little

guidance to be derived from the language of the statute itself," the reviewing court should consider whether the agency's interpretation of the Act "serves to further the purposes of the legislation in a reasonable and sound manner." *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 778 (D.C.Cir. 1977). In the present case, the Court concludes that, as in the *Sea-Land* case, the Secretary's interpretation of the Act furthers the Act's purposes.

The goals of the Merchant Marine Act of 1936 were described by the *Sea-Land* court as follows:

> The Merchant Marine Act of 1936 was enacted to foster the development and continued maintenance of a modern merchant marine fleet for the United States. The Act's declaration of policy states [in 46 U.S.C. § 1101] that
>
> > It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency * * *.
>
> To accomplish these goals the Act establishes two subsidies for American shipping enterprises—the operating-differential subsidy . . . and a construction-differential subsidy (CDS) . . . .

566 F.2d 765. There can be no doubt that these statutory purposes are extraordinarily broad, and it would be patently inconsistent with the far-reaching nature of this statutory scheme to interpret the Secretary's authority

in an unnecessarily restrictive manner. Plaintiffs' position that the domestic trading restrictions of CDS contracts are *totally irrevocable* precludes any and all administrative flexibility and thereby at least potentially obstructs the Secretary's ability to effectuate the broad statutory goals set forth above. In view of the fact that neither section 506 nor its legislative history indicates that the Secretary's authority should be limited in this manner, the Court concludes that plaintiffs' construction is unreasonably constrictive.

As the Supreme Court said in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1968):

> This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the [agency's] broad responsibilities . . . demand a generous construction of its statutory authority.

And, as the Court of Appeals for this Circuit recently held in *Natural Resources Defense Council, Inc.* v. *Costle*, 568 F.2d 1369, 1381-1382 (1977): "[W]here intent on an issue is unclear, we are instructed to afford the administering agency the flexibility necessary to achieve the general objectives of the Act." For these reasons, the Court concludes that the Secretary's interpretation that she has legal authority under the Act to waive permanently domestic trading restrictions in an appropriate case in exchange for CDS repayment is reasonable and should be upheld.[2]

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[2] This is not to say that the Secretary's authority to waive permanently domestic trading restrictions in exchange for CDS repayment is unbridled. Rather, it is to say that the appropriateness of the Secretary's invocation of such authority is best judged on a case-by-case basis. *See* section VI, *infra*.

This conclusion is buttressed by the Comptroller General's 1964 decision with respect to two CDS ships owned by Grace Line, Inc., Decision B-155039, 44 Comp. Gen. 180 (1964), and by the consistent reaffirmation of the validity of this decision by both the Secretary and, on at least one occasion, by Congress. The 1964 *Grace Line* opinion concerned the S.S. SANTA ELIANA and the S.S. SANTA LEONOR, both of which were built under CDS contracts and were therefore subject to the section 506 domestic trading restrictions. Grace Line requested the Secretary to amend the CDS contracts on these ships to remove the domestic trading restrictions in exchange for repayment of CDS so that the vessels could be used in domestic trade. The Secretary concluded that MarAd/MSB had the legal authority to so amend CDS contracts and sought the views of the Comptroller General on this subject. The *Grace Line* opinion manifests the Comptroller General's concurrence in the Secretary's interpretation of MarAd/MSB's authority.

Since the 1964 *Grace Line* transaction, the Secretary has consistently interpreted section 506 as *not* precluding permanent waiver of domestic trading restrictions in exchange for CDS repayment in the few instances when the issue has arisen. Thus, in 1970, when Seatrain Lines, Inc., the parent of the defendant-intervenors herein, proposed that MarAd/MSB agree, as part of a CDS contract for two vessels other than the STUYVESANT, to permit "*permanent* operation of the vessels in domestic trade upon the repayment of the unamortized portion of CDS," MarAd/MSB's General Counsel reaffirmed the Department's position that the Secretary has the "discretionary authority" in an appropriate case to lift section 506 trading restrictions in exchange for CDS repayment.[3]

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[3] Plaintiffs make much of the fact that this legal opinion recommended against approving the repayment proposal. The proposal, however, sought a *pre-contract commitment* from the Secretary to permit CDS buyback "at any time" after contract expiration. The

MarAd/MSB again reaffirmed this position in 1976. At that time, the Atlas Marine Company and the Aquarius Marine Company requested MarAd/MSB to agree to an amendment of their CDS contracts for the S.S. AMERICAN HERITAGE and the S.S. GOLDEN MONARCH respectively These vessels were at that time engaged in trade between the mainland United States and the Virgin Islands, which are not considered a domestic port for the purposes of domestic trading restrictions. *See American Maritime Association* v. *Blumenthal, supra.* MarAd/MSB approved the requested amendments which permit the vessel owners to repay CDS in exchange for the removal of domestic trading restrictions *if* the non-domestic status of the Virgin Islands is changed at some later date. While plaintiffs attempt to downplay the significance of these recent CDS contract amendments because of their conditional nature, there can be no doubt that MarAd/MSB's actions with respect to these contracts were based on a reaffirmation of the Secretary's legal authority to waive trading restrictions in exchange for CDS repayment.

In addition to these administrative reaffirmations of the Secretary's authority, Congress has implicitly affirmed the Secretary's exercise of authority in the *Grace Line* case. In 1972, Congress amended section 1104(a)

General Counsel considered such a proposal contrary to the purposes of the Act because it would "bind future Boards to exercise a discretionary authority without any regard" to the particular circumstances of a specific application. Thus, the legal opinion concludes:

> The consequence of [the] proposal, if accepted, would be to convert a *matter of future exercise of discretionary authority* by the Board into a present right of [the CDS recipient], at its option, to lift the restrictions by CDS repayment.
>
> Such a result is not in keeping with the basic policies of the Act and conflict with the scope of discretionary authority intended to be vested in the Board.

(Emphasis added.)

(3) of Title XI of the Act, 46 U.S.C. § 1274(a)(3), to expand the Secretary's financing authority under Title XI to include loan guarantees for the purpose of financing repayments "in whole or in part" of CDS. This section, when initially introduced, spoke of

> financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions.

H.R. 9756, 92d Cong., 1st Sess. § 3 (1971). Of course, the financing authority conferred by Title XI is necessarily predicated on the authority of the Secretary to approve the underlying transaction, for otherwise Title XI financing authority would be a useless device. Thus, if Congress had enacted the entirety of the above-quoted language, the second half of which speaks of releasing CDS vessels from *all* restrictions resulting from the payment of CDS, Congress' affirmation of the Secretary's interpretation would have been explicit.

Congress did not enact this initially-proposed language in its entirety; instead it enacted only the first half of the section as introduced, thereby omitting the explanatory language in the second half. The House report indicates clearly, however, that the reason the Committee on Merchant Marine and Fisheries omitted the explanatory language was *not* to limit the Secretary's Title XI financing authority to one type of CDS repayment arrangement or another, but rather to extend such authority "to all instances of subsidy repayments under Title V." In

explaining this action, the Report makes express reference to the *Grace Line* case:

> In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee therefore has amended the legislation by deleting the [explanatory] language.

H.R.Rep.No. 92-688, 92d Cong., 1st Sess. 10 (1971). There can be no doubt that this explanation evidences the Committee's belief that the 1936 Act authorized the Secretary, *inter alia*, to remove domestic trading restrictions in exchange for CDS repayment, and Congress' enactment of the House Committee's version of section 1104(a)(3) must be deemed as approving the Committee's understanding of the Secretary's authority.

In view of the Secretary's consistent and relatively long-standing interpretation of her authority, the Court finds that the present case is an appropriate one in which to defer to the "experience and informed judgment" of the Secretary. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).[4] Such deference

[4] Nothing in this Court's recent opinion in *Investment Annuity, Inc.* v. *Blumenthal*, 442 F.Supp. 681 (D.D.C. 1977), is inconsistent with the conclusion herein that the Secretary's interpretation of her authority in the circumstances of this case is entitled to substantial deference. In *Investment Annuity*, wherein the Court refused to accord substantial deference to the Internal Revenue Service, the

is particularly warranted in this case because of Congress' implicit affirmation of the Secretary's interpretation in its enactment of the 1972 amendments to Title XI of the Act. In view of the fact that the Secretary's interpretation is reasonable and seems to further the purposes of the Act, and since deference to this interpretation is warranted in the instant case, the Court holds that section 506 does *not* bar the Secretary from waiving domestic trading restrictions permanently in exchange for repayment of CDS.

In conclusion, therefore, the Secretary has authority to accept repayment of CDS in appropriate circumstances. Since section 506 does *not* preclude the permanent waiver of domestic trading restrictions in exchange for such repayment, the Secretary has authority to waive permanently the section 506 domestic trading restrictions upon the STUYVESANT in exchange for CDS repayment.

IV. THE ACT DOES NOT PRECLUDE THE SECRETARY FROM ACCEPTING A 20-YEAR PROMISSORY NOTE AS REPAYMENT FOR A CONSTRUCTION—DIFFERENTIAL SUBSIDY

Plaintiff's second basis for challenging the Secretary's actions with respect to the CDS repayment for the STUYVESANT is that the form of repayment approved by the Secretary—a 20-year promissory note—is not equivalent to *full* repayment and that only full repayment will suffice to permit the Secretary to waive permanently domestic trading restrictions. Of course, as the preceding

Service's interpretation was entirely unprecedented and was in fact inconsistent both with 12 years of consistent treatment by the Service and with a private ruling issued by the Service during the pendency of the litigation. Moreover, the Service's new interpretation was unreasonable and was the product of improper tax reform considerations. Thus, the difference between the two cases could hardly be more pronounced.

discussion reveals, the Secretary's authority to accept CDS repayment in appropriate cases is not explicit in the Act. As a result, there is naturally neither statutory language nor legislative history to elucidate the scope of the Secretary's authority to structure the form of such repayment transactions.

In view of the Secretary's broad contractual authority which all parties agree extends to appropriate CDS repayment transactions, and the Court's previous conclusion that it would be patently inconsistent with the far-reaching nature of the Act's statutory scheme to interpret the Secretary's authority in an unnecessarily restrictive manner, the Court finds that it would be entirely inappropriate at this stage of the litigation for the Court to accept plaintiffs' contention that no form of promissory note can legally be accepted by the Secretary as repayment for CDS. The Court concurs in defendant-intervenors' assessment that the determination of the legality of a given method of payment is most appropriately left to the discretion of the Secretary with judicial interference restricted to review of individual determinations to ensure that the requirements of the Administrative Procedure Act (APA) are satisfied. Accordingly, the Court concludes that CDS repayment by means of a promissory note is not precluded by the Act.

V. PLAINTIFFS' HAVE BEEN DEPRIVED OF NO PROPERTY INTEREST COGNIZABLE UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, AND THEY ARE THEREFORE ENTITLED TO NO RELIEF UPON THEIR CONSTITUTIONAL CLAIM

The third ground upon which plaintiffs challenge the defendants' actions with respect to the STUYVESANT is the Due Process Clause of the fifth amendment. Plaintiffs assert that this clause requires the Secretary to afford

plaintiffs and other interested parties an adequate opportunity to present their views before approving the waiver of domestic trading restrictions. They contend that the Secretary therefore denied them due process of law by not giving them adequate notice of Polk's August 25, 1977 application for total CDS repayment and permanent waiver of domestic trading restrictions.

Notwithstanding the alleged "lack of process" in the Secretary's decision-making with respect to the STUYVESANT, it is clear that plaintiffs' rights under the Due Process Clause were not abridged. The Due Process Clause is not a panacea for all instances where an agency of the federal government fails to act pursuant to appropriate procedures. Rather, as the Court of Appeals for this Circuit recently held:

> Only if the Court first finds that a "liberty" or "property" interest is affected will it go on to a balancing of interests analysis to determine what level of procedural protection is appropriate. *E.g. Fusari* v. *Steinberg*, 419 U.S. 379, 389, 95 S.Ct. 533, 42 L.Ed. 2d 521 (1975); *Board of Regents* v. *Roth*, [408 U.S. 564, 570-71 & n.8, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)]; *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Mazaleski v. *Treusdell*, 562 F.2d 701, 709 (D.C.Cir. 1977). *Accord, Colm* v. *Vance*, 567 F.2d 1125 (D.C.Cir. Nov. 18, 1977).

In the instant case, plaintiffs have no "property interest" in the STUYVESANT transaction within the meaning of the Due Process Clause. Plaintiffs have alleged that the Secretary's actions deprived them of a "business opportunity," denied them their statutory right to be free from the unfair competition of CDS-vessels, and indirectly caused their vessels to decrease in value because the result of the Secretary's actions is to increase

the supply of ships qualified to engage in domestic trade. Plaintiffs have cited absolutely no applicable precedents for characterizing these injuries as deprivations of "property interests." Plaintiffs have no "legitimate claim of entitlement" to be free from competition. *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Accordingly, the Court concludes that plaintiffs have not been deprived of any property interests cognizable under the Due Process Clause. If they are entitled to any relief as a result of the alleged "lack of process" in the Secretary's decision-making with respect to the STUYVESANT, such relief must be derived from the Administrative Procedure Act (APA) or some other federal statute.

VI. THE SECRETARY FAILED TO GIVE FULL AND PROPER CONSIDERATION TO THE COMPETITIVE EFFECTS OF HER DECISIONS TO ACCEPT CDS REPAYMENT BY WAY OF A 20-YEAR PROMISSORY NOTE AND TO WAIVE PERMANENTLY DOMESTIC TRADING RESTRICTIONS UPON THE STUYVESANT, AND HER DECISION WAS, THEREFORE, ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

Having determined that the Secretary has general authority to accept CDS repayment and to waive permanently domestic trading restrictions in exchange for such repayment, that the Act does not proscribe the acceptance of a promissory note as repayment for CDS, and that plaintiffs have no property interest in the STUYVESANT transaction cognizable under the Due Process Clause, it becomes necessary to consider plaintiffs' final contention that the Secretary's actions with respect to the STUYVESANT are violative of the APA. Plaintiffs assert three claims in support of this contention. First, they ar-

gue that the defendants acted in violation of 5 U.S.C. § 552(a)(1), as interpreted by the Supreme Court in *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), by failing to promulgate "substantive rules of general applicability," 5 U.S.C. § 552(a)(1)(D), prior to acting in the instant case. Second, they claim that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that the "operative decision" to waive domestic trading restrictions on the STUYVESANT was made without notice sometime in 1975 and kept secret until August 1977. Finally, they claim that the Secretary's decisions to waive domestic trading restrictions and to accept a 20-year promissory note as CDS repayment were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because these decisions were made without full and proper consideration of relevant factors. For the reasons hereinafter stated, the Court concludes that plaintiffs are entitled to partial summary judgment on their third APA claim, that defendants and defendant-intervenors are entitled to summary judgment on plaintiffs' first APA claim and, finally, that material facts in dispute preclude resolution of plaintiffs' second APA claim.

Plaintiffs' first APA claim—that defendants violated 5 U.S.C. § 552(a)(1)—is based on the 1974 decision by the Supreme Court in *Morton* v. *Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270. In that case, the Court employed some extraordinary far-reaching language in holding that the Bureau of Indian Affairs of the Department of the Interior had failed to comply with the APA in developing eligibility requirements for welfare benefits. Thus, the Court said:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or ex-

> plicitly, by Congress. . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis by the dispenser of funds.
>
> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.

415 U.S. at 232-33, 94 S.Ct. at 1072-73.

Notwithstanding this sweeping language, it appears to the Court that section 552(a)(1) does not compel the Secretary to promulgate regulations to govern *all* aspects of her general contractual authority. Although *Ruiz* might suggest otherwise, it appears that neither the Supreme Court nor the lower courts have interpreted *Ruiz* in such an expansive manner. *See* K. Davis, *Administrative Law of the Seventies* § 6.13-1(1976) ("Altogether, the *Ruiz* opinion does not seem to be a reliable guide as to present or future law." (at 240)). A careful reading of section 552(a)(1) and particularly subsection (D) indicates that, rather than requiring the promulgation of substantive regulations as plaintiffs contend, this section requires the *publication* of such rules and interpretations "of general applicability" that are in fact "formulated and adopted by the agency." Accordingly, the Court concludes that the APA does not *require* the Secretary to promulgate regulations prior to exercising her general contractual authority to accept CDS repayment and to waive permanently domestic trading restrictions.

Nevertheless, as the Court indicated at the most recent hearing in this case, the Court firmly believes that whether or not the strict mandate of Congress requires the promul-

gation of regulations, the Secretary should, as a matter of sound policy, establish guidelines and procedures of general applicability to govern CDS repayment and permanent waivers of domestic trading restrictions. The Court is unpersuaded that there is any compelling reason for the Secretary to make determinations on applications such as that concerning the STUYVESANT on an *ad hoc* basis. Substantive guidelines and procedural requirements for applications should be established so that all members of the industry stand on equal footing before the Secretary, and these procedures should guarantee interested competitors and members of the public the opportunity to be heard. *Cf. Joseph* v. *United States Civil Service Commission*, 180 U.S.App.D.C. 281, 293, 554 F.2d 1142, 1154 n.26 (1977). As the Court of Appeals for this Circuit stated in a related maritime-subsidy context:

> [S]ince Congress has delegated the authority to the Secretary to pass upon applications for contracts of government subsidy, and since these grants are part of the govervent wealth, it is incumbent upon the Secretary to follow sound administrative procedures to determine the necessity of expenditures and thereby serve the master, public interest.

Sea-Land Service, Inc. v. *Connor*, 135 U.S.App.D.C. 306, 313, 418 F.2d 1142, 1149 (1969). The Court is confident that the Secretary will give these concerns regarding the need for appropriate regulations her most serious consideration.

Plaintiffs' second APA claim is that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that the "operative decision" to accept CDS repayment and to waive permanently domestic trading restrictions on the STUYVESANT was made without notice in 1975 and

kept secret until August 1977. It appears to the Court, however, that material facts remain in dispute with respect to plaintiffs' allegations concerning the pre-1977 actions of the Secretary. It further appears to the Court that additional discovery should be permitted prior to resolution of this APA argument. Accordingly, the Court will at this time deny those portions of defendants' and defendant-intervenors' motions that seek summary judgment on this second APA claim.[5]

Plaintiffs' final APA claim is that the Secretary's actions were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) in that she failed to give full and proper consideration to relevant factors prior to rendering her decisions with respect to the STUYVESANT. It is a well-established tenet of administrative law that an essential function of judicial review is to ensure that the agency decision was based on a consideration of the "relevant factors." *See, e.g., Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *American Paper Institute* v. *Train*, 177 U.S.App.D.C. 181, 191, 543 F.2d 328, 338 (1976); *Ethyl Corp.* v. *EPA* 176 U.S App.D.C. 373, 408, 541 F.2d 1, 34, *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49L.Ed.2d 394 (1976). Failure of an agency to consider such relevant factors, or failure to accord such factors appropriate weight, renders the agency's decision arbitrary and capricious. *Id.* In making this determination, the focal point of the Court's scrutiny must be the "full administrative record that was before the Secretary at the time [she] made [her] decision." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 410 U.S. at 421, 91 S.Ct. at 825. *See Doraiswamy* v. *Secretary of Labor*, 180 U.S.App.D.C. 360, 369-370, 555 F.2d 832, 841-42 (1976).

[5] Plaintiffs have not moved for summary judgment on this claim because of their alleged need for further discovery.

Defendants in the present case submitted to the Court on October 28, 1977, two certified administrative records. The first of these deals with the Secretary's decision to accept repayment of CDS and to waive permanently domestic trading restrictions in exchange therefor. The second concerns the Secretary's decision to approve the sale of the STUYVESANT and the related financial transactions that were closed on September 30, 1977. The Court has carefully scrutinized both records. This scrutiny reveals that the Secretary gave serious consideration to the following factors: (1) the lack of viable employment opportunities for the STUYVESANT other than in the Alaska oil trade; (2) the improvement of the Government's collateral position and the prevention of possible defaults on other outstanding obligations; and (3) the continued viability of Seatrain Shipbuilding. This scrutiny also reveals, however, that the Secretary failed to consider the effect of her decisions with respect to the STUYVESANT upon competition in the domestic transportation of Alaskan oil. It thus becomes necessary to determine whether "competitive effect" is a "relevant factor" such that the Secretary's failure to consider such effect renders her decision arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A).

Of course, since the Act contains no express authority for permanent waivers of domestic trading restrictions, there are no specific statutory factors which the Secretary must consider in determining whether to accept CDS repayment in exchange for such waivers. Similarly, the Act provides no express guidance as to what factors should be considered by the Secretary in structuring the form of such repayment. Moreover, the Secretary has promulgated no guidelines of her own to govern decisions of these types. This is not to say, however, that the Secretary's authority in these matters is unrestricted. The absence of express legislative authority to waive permanently domestic trading restrictions should not effectively insulate

the Secretary from judicial review. Rather, in the absence of express statutory and regulatory guidelines, the Court must look to the purposes of the Act to ascertain what factors the Secretary should consider in her decision-making. *Cf. Sea-Land Service, Inc.* v. *Kreps*, *supra.*

Analysis of the Act and its legislative history indicates clearly that the protection of unsubsidized vessels from the "unfair" competition of subsidized vessels is one of the cornerstones of the statutory scheme. The most compelling evidence of the importance of this statutory purpose is section 506 itself, which, as previously demonstrated, *requires* CDS recipients to agree to domestic trading restrictions. As both the 1936 and 1938 legislative histories reveal, an overriding concern of Congress in replacing the pre-existing mail subsidy program with the CDS and ODS programs of the 1936 Act was to insulate unsubsidized domestic vessels from the debilitating effect of subsidized competition. Thus the *pro rata* payback for the six-month waivers expressly authorized by section 506 was specifically intended to ensure that subsidized vessels would at no time possess an unfair cost advantage over unsubsidized vessels. The importance of the competitive effect of trading restriction waivers is further underscored by MarAd's recently promulgated regulations governing temporary section 506 waivers for the carriage of Alaskan oil between Alaska and the Panama Canal. These regulations, 46 C.F.R. §§ 250.1-250.6, 42 Fed. Reg. 33,035-36 (June 29, 1977), specifically require the Assistant Secretary of Commerce for Maritime Affairs to publish notice of all temporary waiver applications for the carriage of Alaskan oil and further require him to give consideration to written protests filed by competitiors. 46 C.F.R. § 250.4. There can be no doubt that this second requirement evidences that the Secretary herself recognizes the importance of considering

the competitive effect of waivers of section 506 domestic trading restrictions.[6]

These indications of statutory purpose lead the Court to conclude that competitive effect is not only a "relevant factor," but is in fact an essential factor to be considered before decisions with respect to trading restriction waivers are made. Thus, before approving the permanent waiver of domestic trading restrictions upon the STUYVESANT, the Secretary should have given full consideration to (1) the effect upon competition of permitting the STUYVESANT to engage in the Alaskan oil trade, and (2) the effect upon competition of permitting Polk to repay the STUYVESANT's CDS with a 20-year promissory note rather than requiring immediate payment in full and/or requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain Shipbuilding. The Secretary's failure to give full consideration to these effects must be deemed to render her decisions with respect to the STUYVESANT arbitrary, capricious, and an abuse of discretion and, therefore, violative of 5 U.S.C. § 706(2)(A).

Accordingly, the Court will grant plaintiffs' summary judgment in part insofar as their motions seek relief for the Secretary's failure to give appropriate consideration to relevant factors in her decision-making with respect to the STUYVESANT. The Court will therefore remand the case to the Secretary in order to permit her to consider the protests of plaintiffs and other interested parties and to give appropriate weight to competitive effect in her ultimate decision with respect to the STUY-

[6] Further evidence of the Secretary's recognition of the importance of competitive effect is that she excluded from the waiver regulations those segments of the Alaskan oil trade—Alaska-West Coast and Panama Canal-Atlantic/Gulf Coast—for which "suitable tank vessels built without CDS appear to be available." 42 Fed.Reg. at 33,035.

VESANT. Because of the necessity of the expeditious final resolution of this controversy, the Court will order defendants to complete such further consideration within 45 days from the date of this Memorandum Opinion and accompanying Order.

VII. CONCLUSION

The Court concludes that the Secretary of Commerce has authority under the Merchant Marine Act of 1936 to waive permanently domestic trading restrictions on a vessel built with construction-differential subsidy in exchange for repayment of such subsidy and that the Secretary further has authority to accept a 20-year promissory note as such repayment. The Court also concludes that plaintiffs have no property interest in the STUYVESANT transactions which is cognizable under the Due Process Clause of the fifth amendment. In addition, the Court concludes that defendants are not required by 5 U.S.C. § 552(a)(1) to promulgate "substantive rules of general applicability" to govern CDS payback and permanent trading restriction waivers. Accordingly, the Court will grant defendants' and defendant-intervenors' motions for summary judgment with respect to those portions of the complaints herein that seek relief based on the aforestated arguments.

The Court concludes, however, that plaintiffs are entitled to partial summary judgment with respect to their claim that the Secretary's decisions concerning the STUYVESANT were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because she failed to consider the competitive effects of her decisions. Accordingly, the Court will remand this case to the Secretary for her immediate consideration.

Finally, the Court concludes that plaintiffs' remaining claim that the Secretary's decisions with respect to the

STUYVESANT were arbitrary, capricious, and an abuse of discretion because they were made without notice in 1975 and kept secret until August 1977 cannot be resolved on the pending motions because material facts relating to this claim remain in dispute. Accordingly, the Court will deny defendants' and defendant-intervenors' motions for summary judgment insofar as they relate to this claim, and this claim will remain before the Court to permit further discovery.

An Order in accordance with the foregoing will be issued of even date herewith.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

THE MERCHANT MARINE ACT, 1936, AS AMENDED, 46 U.S.C. §§ 1101 *et seq.*, AS AMENDED

Title I, § 101 of the Act, 46 U.S.C. § 1101 ... 98a

Title II, § 207 of the Act, 46 U.S.C. § 1117 .. 99a

Title II, § 210 of the Act, 46 U.S.C. § 1120 .. 99a

Title II, § 211 of the Act, 46 U.S.C. § 1121 .. 100a

Title II, § 212 of the Act, 46 U.S.C. § 1122 .. 102a

Reorganization Plan No. 21 of 1950 ..... 104a

Reorganization Plan No. 7 of 1961 ..... 108a

Title V, § 501 of the Act, 46 U.S.C. § 1151.. 113a

Title V, § 502 of the Act, 46 U.S.C. § 1152.. 115a

Title V, § 504 of the Act, 46 U.S.C. § 1154.. 122a

Title V, § 506 of the Act, 46 U.S.C. § 1156.. 122a

Title XI, § 1104(a)(3), 46 U.S.C. § 1274(a)(3) 123a

MERCHANT MARINE ACT, 1936

(Revised through the 94th Congress)

[49 Stat. 1985, approved June 29, 1936]

AN ACT

To further the development and maintenance of an adequate and well-balanced American merchant marine, to promote the commerce of the United States, to aid in the national defense, to repeal certain former legislation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—DECLARATION OF POLICY

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

SEC. 207. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the Commission's financial transactions shall be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922 (42 Stat. 444): *Provided.* That it shall be recognized that, because of the business activities authorized by this Act, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission from the provisions of this Act.

SEC. 210. It shall be the duty of the Secretary of Commerce to make a survey of the American merchant marine, as it now exists, to determine what additions and replacements are required to carry forward the national policy declared in section 101 of this Act, and the Secretary of Commerce is directed to study, perfect, and adopt a long-range program for replacements and additions to the American merchant marine so that as soon as practicable the following objectives may be accomplished:

First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service essential for maintaing the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of

such a fleet the Secretary of Commerce is directed to cooperate closely with the Navy Department as to national-defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

Second, the ownership and the operation of such a merchant fleet by citizens of the United States insofar as may be practicable.

Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils.

Fourth, the creation and maintenance of efficient shipyards and repair capacity in the United States with adequate numbers of skilled personnel to provide an adequate mobilization base.

SEC. 211. The Secretary of Commerce is authorized and directed to investigate, determine, and keep current records of—

(a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Secretary of Commerce to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching his determination the Secretary of Commerce shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent businessman would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such lines may afford to the foreign commerce of the United States, to the national defense, and to other national requirements;

(b) The bulk cargo carrying services that should, for the promotion, development, expansion, and maintenance of the foreign commerce of the United States and for the national defense or other national requirements be provided by United States-flag vessels whether or not operating on particular services, routes, or lines;

(c) The type, size, speed, method of propulsion, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service, or which should be employed to provide the bulk cargo carrying services necessary to the promotion, maintenance, and expansion of the foreign commerce of the United States and its national defense or other national requirements whether or not such vessels operate on a particular service, route, or line;

(d) The relative cost of construction of comparable vessels in the United States and in foreign countries;

(e) The relative cost of marine insurance, maintenance, repairs, wages and subsistence of officers and crews, and all other items of expense, in the operation of comparable vessels under the laws, rules, and regulations of the United States and under those of the foreign countries whose vessels are substantial competitors of any such American vessel;

(f) The extent and character of the governmental aid and subsidies granted by foreign governments to their merchant marine;

(g) The number, location, and efficiency of the shipyards existing on the date of the enactment of this Act or thereafter built in the United States;

(h) To investigate and determine what provisions of this Act and other Acts relating to shipping should be made applicable to aircraft engaged in foreign commerce in order to further the policy expressed in this Act, and to recommend appropriate legislation to this end;

(i) The advisability of enactment of suitable legislation authorizing the Secretary of Commerce, in an economic or commercial emergency, to aid the farmers and cotton, coal, lumber, and cement producers in any section of the United States in the transportation and landing of their products in any foreign port, which products can be carried in dry-cargo vessels by reducing rates, by supplying additional tonnage to any American operator, or by operation of vessels directly by the Secretary of Commerce, until such time as the Secretary of Commerce shall deem such special rate reduction and operation unnecessary for the benefit of the American farmers and such producers; and

(j) New designs, new methods of construction, and new types of equipment for vessels; the possibilities of promoting the carrying of American foreign trade in American vessels; and intercoastal and inland water transportation, including their relation to transportation by land and air.

SEC. 212. The Commission is authorized and directed—

(a) To study all maritime problems arising in the carrying out of the policy set forth in title I of this Act;

(b) To study, and to cooperate with vessel owners in devising means by which—

(1) the importers and exporters of the United States can be induced to give preference to vessels under United States registry; and

(2) there may be constructed by or with the aid of the United States express-liner or super-liner vessels com-

parable with those of other nations, especially with a view to their use in national emergency, and the use in connection with or in lieu of such vessels of transoceanic aircraft service;

(c) To collaborate with vessel owners and shipbuilders in developing plans for the economical construction of vessels and their propelling machinery, of most modern economical types, giving thorough consideration to all well-recognized means of propulsion and taking into account the benefits accruing from standardized production where practicable and desirable;

(d) To establish and maintain liaison with such other boards, commissions, independent establishments, and departments of the United States Government, and with such representative trade organizations throughout the United States as may be concerned, directly or indirectly, with any movement of commodities in the water-borne export and import foreign commerce of the United States, for the purpose of securing preference to vessels of United States registry in the shipment of such commodities;

(e) To investigate, under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected; and

(f) To study means and methods of encouraging the development and implementation of new concepts for the carriage of cargo in the domestic and foreign commerce

of the United States, and to study the economic and technological aspects of the use of cargo containers as a method of carrying out the declaration of policy set forth in title I of this Act, and in carrying out the provisions of this clause and such policy the United States shall not give preference as between carriers upon the basis of length, height, or width of cargo containers or length, height, or width of cargo container cells and this requirement shall be applicable to all existing container vessels and any container vessel to be constructed or rebuilt.

(g) To make recommendations to Congress, from time to time, for such further legislation as it deems necessary better to effectuate the purpose and policy of this Act.

Reorganization Plan No. 21 of 1950 (64 Stat. 1273)

Effective May 24, 1950

[As amended by Public Law 91-469 (84 Stat. 1036)]

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, aproved June 20, 1949

PART I. FEDERAL MARITIME BOARD

SECTION 101. *Creation of Federal Maritime Board.*—There is hereby established a Federal Maritime Board, hereinafter referred to as the Board.

SEC. 102. *Composition of the Board.*—(a) The Board shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) The President shall from time to time designate one of such members to be the Chairman of the Board, hereinafter referred to as the Chairman.

(c) One of such members first appointed shall be appointed for a term expiring on June 30, 1952, another for a term expiring on June 30, 1953, and the third for a term expiring on June 30, 1954. Their successors shall be appointed for terms of four years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Not more than two of the members of the Board shall be appointed from the same political party. A vacancy in the office of any such members shall be filled in the same manner as the original appointment. The Chairman shall receive a salary at the rate of $16,000 per annum, and each of the other two members shall receive a salary at the rate of $15,000 per annum.

(d) A vacancy in the Board, so long as there shall be two members in office, shall not impair the power of the Board to execute its functions. Any two of the members in office shall constitute a quorum for the transaction of the business of the Board, and the affirmative votes of any two members of the Board shall be sufficient for the disposition of any matter which may come before the Board.

SEC. 103. *Transfer of functions to the Chairman.*—All functions of the Chairman of the United States Maritime Commission (including his functions under the provisions of Reorganization Plan Numbered 6 of the 1949) with respect to the functions transferred to the Board by the provisions of sections 104 and 105 of this reorganization plan are hereby transferred to the Chairman of the Federal Maritime Board.

SEC. 104. *Transfer of regulatory functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board.

(1) All functions under the provisions of sections 14 to 20, inclusive, and sections 22 to 33, inclusive, of the Shipping Act, 1916, as amended (46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by water and of other persons.

(2) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 843-848).

(3) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1)(a) thereof.

(4) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212(e) of the Merchant Marine Act, 1936 (46 U.S.C. 1122(e)).

(5) So much of the functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820), as relates to the functions of the Board under the provisions of sections 104(1) to 104(4), inclusive, of this reorganization plan.

SEC. 105. *Transfer of subsidy award and other functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

(1) The functions with respect to making, amending, and terminating subsidy contracts, and with respect to conducting hearings and making determinations antecedent to making, amending, and terminating subsidy contracts, under the provisions of Titles V, VI, and VIII, and sections 301, 708, 805(a), and 805(f) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1131, 1151-1182, 1198, 1211-1213, 1223(a), and 1223(f)), together with the functions with respect to making changes, subsequent to entering into an operating differential subsidy contract, in such determinations under the provisions of section 301 of such Act, as amended (46 U.S.C. 1131), and readjustments in determinations as to operating cost differentials under the provisions of section 606 of such Act, as amended (46 U.S.C. 1176), and with respect to the approval of the sale, assignment, or transfer of any operating subsidy contract under section 608 of such Act (46 U.S.C. 1178): *Provided*, That, for the purposes of this section 105(1) of this reorganization plan, the term "subsidy contract" shall be deemed to include, in the case of a construction differential subsidy, the contract for the construction, reconstruction, or reconditioning of the vessel and the contract for the sale of the vessel to the subsidy applicant or the contract to pay a construction differential subsidy and the cost of national defense features, and, in the case of an operating differential subsidy, the contract with the subsidy applicant for the payment of the subsidy: *Provided further*, That, except as otherwise hereinbefore provided in respect of functions under sections 301, 606, and 608 of the Merchant Marine Act, 1936, as amended, the functions transferred by the provisions of this section 105(1) shall exclude the making of all determinations and the taking of all actions (other than amending or terminating any

subsidy contract), subsequent to entering into any subsidy contract, which are involved in administering such contract: *Provided further*, That actions of the Board in respect to the functions transferred by the provisions of this section 105(1) shall be final.

Reorganization Plan No. 7 of 1961 (75 Stat. 840)

Effective August 12, 1961

[As amended by Public Law 91-469 (84 Stat. 1036)]

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, June 12, 1961, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203, as amended

MARITIME FUNCTIONS

PART I—FEDERAL MARITIME COMMISSION

SECTION 101. *Creation of Federal Maritime Commission.*—(a) There is hereby established a Federal Maritime Commission, hereinafter referred to as the Commission.

(b) The Commission shall not be a part of any executive department or under the authority of the head of any executive department.

SEC. 102. *Composition of the Commission.*—(a) The Commission shall be composed of five Commissioners, who shall be appointed by the President by and with the advice and consent of the Senate. Each Commissioner shall be removable by the President for inefficiency, neglect of duty, or malfeasance in office.

(b) The President shall from time to time designate one of the Commissioners to be the Chairman of the Commission.

(c) Of the first five Commissioners appointed hereunder, one shall be appointed for a term expiring on June 30, 1962, one for a term expiring on June 30, 1963, one for a term expiring on June 30, 1964, and two for terms expiring on June 30, 1965. Their successors shall be appointed for terms of four years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. Not more than three of the Commissioners shall be appointed from the same political party. A vacancy in the office of any such Commissioner shall be filled in the same manner as the original appointment. The Chairman of the Commission shall receive a salary at the rate of $20,500 per annum, and each of the other Commissioners shall receive a salary at the rate of $20,000 per annum.

(d) A vacancy in the Commission, so long as there shall be three Commissioners in office, shall not impair the power of the Commission to execute its functions. Any three of the Commissioners in office shall constitute a quorum for the transaction of the business of the Commission and the affirmative votes of any three Commissioners shall be sufficient for the disposition of any matter which may come before the Commission.

SEC. 103. *Transfer of functions to Commission.*—The following functions, which are now vested in the Federal Maritime Board under the provisions of Reorganization Plan No. 21 of 1950 (64 Stat. 1273), are hereby transferred from that Board to the Commission:

(a) All functions under the provisions of sections 14-20, inclusive, and sections 22-33, inclusive, of the Shipping Act, 1916, as amended (46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by water and of other persons.

(b) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 843-848).

(c) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1) (a) thereof.

(d) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212(e) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1122(f)).

(e) To the extent that they relate to functions transferred to the Commission by the foregoing provisions of this section:

(1) The functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820).

(2) The functions with respect to adopting rules and regulations, making reports and recommendations to Congress, subpoenaing witnesses, administering oaths, taking evidence, and requiring the production of books, papers, and documents, under the provisions of sections 204, 208, and 214 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1118, and 1124).

SEC. 104. *Transfer of functions to Chairman.*—There are hereby transferred to the Chairman of the Commission:

(a) The functions of the Chairman of the Federal Maritime Board, including his functions derived from the provisions of Reorganization Plan No. 6 of 1949, to the extent that they relate to the functions transferred to the Commission by the provisions of section 103 of this reorganization plan.

(b) The functions of the Secretary of Commerce to the extent that they are necessary for, or incidental to, the administration of the functions transferred to the Commission by the provisions of section 103 of this reorganization plan.

SEC. 105. *Authority to delegate.*—(a) The Commission shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter: *Provided, however,* That nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended.

(b) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time and in such manner as the Commission shall by rule prescribe: *Provided, however,* That the vote of a majority of the Commission less one member thereof shall

be sufficient to bring any such action before the Commission for review.

(c) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Commission.

(d) There are hereby transferred to the Chairman of the Commission the functions with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to the foregoing subsections of this section.

PART II—DEPARTMENT OF COMMERCE

SEC. 201. *Maritime Administrator.*—There shall be at the head of the Maritime Administration (established by the provisions of part II of Reorganization Plan 21 of 1950) a Maritime Administrator, hereinafter referred to as the Administrator. The Assistant Secretary of Commerce for Maritime Affairs shall, ex officio, to be Administrator. The Administrator shall perform such duties as the Secretary of Commerce shall prescribe.

SEC. 202. *Functions of Secretary of Commerce.*—(a) Except to the extent inconsistent with the provisions of sections 101(b) or 104(b) of this reorganization plan, there shall remain vested in the Secretary of Commerce all the functions conferred upon the Secretary by the provisions of Reorganization Plan No. 21 of 1950.

(b) There are hereby transferred to the Secretary of Commerce:

(1) All functions of the Federal Maritime Board under the provisions of section 105(1) to 105(3), inclusive, of Reorganization Plan No. 21 of 1950.

(2) Except to the extent transferred to the Commission by the provisions of section 103(e) of this reorganization plan, the functions described in the said section 103(e).

(3) Any other functions of the Federal Maritime Board not otherwise transferred by the provisions of Part I of this reorganization plan.

TITLE V—CONSTRUCTION-DIFFERENTIAL SUBSIDY

SEC. 501. (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful

or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of high transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestion for such changes therein as may be deemed necessary or proper in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce, in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this Act, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefore providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this title and under such further conditions and limitations as may be prescribed in the rules and regulations the Secretary of Commerce has adopted as provided in

section 204(b) of this Act; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this Act.

SEC. 502. (a) If the Secretary of the Navy certifies his approval under section 501(b) of this Act, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter into a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 505 of this Act with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and a proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access

to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.

(b) The amount of the reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice of his intention to compute or recompute such estimated

foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 505) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less.

In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in the same proportion as provided for the payments on account of the construction cost in the contract between the ship-

builder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or unreasonable, and if a citizen of the United States agrees to purchase said vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so

constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction-differential subsidy determined as provided by subsection (b), such sale to be in accordance with all the provisions of this title.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall, at least once each year, as required for purposes of this Act, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under title V and VII, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this Act, negotiate with the

bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this Act, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Commerce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under title V, except section 509) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this Act. If the vessel is constructed under section 509 the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus

one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater than the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bidder, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 215, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce, less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b), such sale to be in accordance with all the provisions of this title. Such vessel shall thereupon be eligible for an operating-differential subsidy under title VI of this

Act, notwithstanding the provisions of section 601(a)(1), and section 610(1), or any other provision of law.

SEC. 504. If a qualified purchaser under the terms of this title desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this title, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 502, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 502(a) or under a contract negotiated by the Secretary of Commerce as provided in section 502(b) in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this title to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 503 of this title. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

SEC. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic

coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

SEC. 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—

(1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal

trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 905 of this Act for purposes of title V of this Act; (D) in the fishing trade or industry; or (E) with respect to floating drydocks in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1105 and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this title, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

(b) Obligations guaranteed under this title—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

and

POLK TANKER CORPORATION,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

BRIEF OF THE SOHIO NATURAL RESOURCES COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

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BRIEF OF THE SOHIO NATURAL RESOURCES COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sohio Natural Resources Company ("SOHIO") submits this brief *amicus curiae* in support of the petitioners' request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit in this case. [All parties to this action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk.]

INTEREST OF AMICUS CURIAE

SOHIO is a major consumer of tanker services in the domestic Alaskan oil trades and the current time-charterer through September 1980 of the T. T. STUYVESANT, the 225,000 deadweight ton oil tanker upon which this case centers. SOHIO's commercial interests could be impaired should this Court fail to review the decision and judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The petitioners have requested this Court to review the decision below concerning the authority of the Secretary of Commerce under the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101 *et seq.* ("the Act") to remove permanently domestic trade restrictions on vessels built with a construction differential subsidy ("CDS") in return for full CDS repayment. This issue is one of importance to the entire maritime industry for reasons adequately explained by the petitioners. The issue additionally has special significance for SOHIO as the current time-charterer of the STUYVESANT and a major consumer of tanker services in the domestic Alaskan oil trade.

The STUYVESANT is presently transporting oil for SOHIO from Valdez, Alaska, to Panama for transshipment to refineries in Gulf and Eastern United States under a three-year charter extending from September 1977 through September 1980. In the absence of review by this Court, the decision below will result in barring the STUYVESANT's continuous participation in the Alaskan oil trade and thus prohibit its completion of the remaining 17 months of its charter with SOHIO. Such a prohibition could interfere with the efficient and critical transportation of crude oil from Alaska to domestic refineries.

This result is ironic in light of the history behind and purposes served by the Secretary's action with respect to the STUYVESANT. SOHIO time-chartered the STUYVESANT in June of 1977 to effectuate its plans to transport North Slope crude oil from Alaska to other states and to assure the success of the Trans-Alaska Pipeline System ("TAPS"). (C.A. Joint App. at 271.) SOHIO's negotiations for charters during the spring and summer of 1977 had revealed (1) a shortage of readily available tonnage suitable for trade from Valdez, Alaska, to Panama transshipment facilities and (2) an unwillingness on the part of some to offer their available vessels at reasonable rates. (C.A. Joint App. at 266-274.) Thus the actions of the Secretary of Commerce that enabled the STUYVESANT to undertake the SOHIO charter responded directly to an extant need for additional tonnage in the domestic Alaskan oil trade and redressed a potentially unhealthy commercial situation in that trade.

The ironclad, mechanical rule adopted below impedes the Secretary's ability to respond to a vessel supply/demand imbalance of the variety that existed for SOHIO in the Alaskan trade in 1977. With the anticipated expansion of Alaskan North Slope crude oil production later this year, the number of vessels qualified and available to carry such oil will probably be inadequate to prevent a recurrence of the unfavorable commercial situation that existed in the summer of 1977. Under such circumstances, it is important that the Secretary of Commerce have the necessary administrative discretion to rectify any vessel supply/demand imbalance.

The decision of the Court of Appeals abrogates the broad purposes of the Merchant Marine Act, 1936, in favor of the interests of a select few. The result may under-

mine SOHIO's ability to transport Alaskan oil in an efficient manner and encourages its victimization as a consumer in any existing and future vessel supply/demand imbalance. The salient congressional purposes behind the Act, as discussed at some length in the Petition for a Writ of Certiorari in this case, are rendered more difficult to achieve by the decision below.

CONCLUSION

For all the above reasons, we support the petitioners' request that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals in this case.

Respectfully submitted,

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Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 30, 1979
CERTIORARI GRANTED JUNE 18, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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* The opinion and dissent issued by the court of appeals on February 6, 1979 are reproduced in Appendix A of the Petition at pages 1a-61a. The opinion issued by the district court on November 22, 1977 is reproduced in Appendix A of the Petition at pages 65a-95a.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1645

SHELL OIL COMPANY,

Plaintiff,

v.

JUANITA M. KREPS

(Individually and as Secretary of the United States Department of Commerce acting in her official capacity),

ROBERT J. BLACKWELL

(Individually, as Assistant Secretary of Commerce for Maritime Affairs and as Chairman of the Maritime Subsidy Board acting in his official capacity),

HOWARD F. CASEY

(Individually, as Deputy Assistant Secretary of Commerce and as Member, Maritime Subsidy Board acting in his official capacity),

SAMUEL B. NEMIROW

(Individually, as General Counsel, Maritime Administration and as Member Maritime Subsidy Board, acting in his official capacity),

Defendants,

SEATRAIN SHIPBUILDING CORPORATION,
POLK TANKER CORPORATION,

Intervenor-Defendants.

Civil Action No. 77-1647

ALASKA BULK CARRIERS, INC.,
TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS,
Secretary of Commerce, U.S. Department of Commerce,

MARITIME ADMINISTRATION,
U.S. Department of Commerce,

MARITIME SUBSIDY BOARD,
U.S. Department of Commerce,

ROBERT J. BLACKWELL,
Individually and as Assistant Secretary of Commerce for Maritime Affairs, Maritime Administrator and Chairman, Maritime Subsidy Board, Maritime Administration, U.S. Department of Commerce.
Defendants,

SEATRAIN SHIPBUILDING CORPORATION,
POLK TANKER CORPORATION,
Intervenor-Defendants.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 22, 1977—Verified complaint, motion for temporary restraining order, and motion for preliminary injunction filed by plaintiff in C.A. 77-1645.

September 22, 1977—Complaint, motion for temporary restraining order, motion for preliminary injunction, affidavits of Larry L. Liddle and John J. Ervin filed by plaintiffs in C.A. 77-1647.

September 22, 1977—Oral motion of Seatrain Shipbuilding Corporation and Polk Tanker Corporation to intervene as party defendants granted.

September 22, 1977—Hearing held and order granting motions for temporary restraining order issued.

September 26, 1977—Order filed granting motion to intervene.

September 28, 1977—Motion to dissolve temporary restraining order and to dismiss, and affidavits of James Carthaus, Robert M. Macy, Jr., and Robert Brown filed by intervenor-defendants.

September 29, 1977—Motion to dissolve temporary restraining order and to dismiss, and affidavits of James S. Dawson, Jr. and Russell F. Stryker, filed by federal defendants.

September 29, 1977—Affidavit of Dennis Burgess filed.

September 29, 1977—Hearing memorandum filed by plaintiffs in C.A. 77-1647.

September 29, 1977—Plaintiffs' motion for preliminary injunction heard and taken under advisement.

September 29, 1977—Proposed findings of fact and conclusions of law filed by intervenor-defendants.

September 30, 1977—Order entered consolidating C.A. 77-1645 and C.A. 77-1647.

September 30, 1977—Findings of Fact and Conclusions of Law, and Order dissolving temporary restraining order, denying plaintiffs' motions for preliminary injunction, and denying without prejudice intervenor-defendants' motion to dismiss entered.

October 12, 1977—Motion for summary judgment and in opposition to motion to dismiss, statement of material facts, and affidavit of William Karas, filed by plaintiffs in C.A. 77-1647.

October 13, 1977—Motion for summary judgment and in opposition to motion to dismiss filed by plaintiff in C.A. 77-1645.

October 13, 1977—Status Call.

October 18, 1977—Memorandum in opposition to plaintiffs' motions and in support of motion to dismiss, and statement of material facts, filed by intervenor-defendants.

October 18, 1977—Memorandum in opposition to plaintiffs' motion for summary judgment and in support of motion to dismiss, and affidavits of Russell F. Stryker and Edmond J. Fitzgerald filed by federal defendants.

October 18, 1977—Amendment to complaint filed by plaintiff in C.A. 77-1645.

October 20, 1977—Stipulation of Undisputed Facts filed.

October 20, 1977—Statement of Issues and Response filed by federal defendants and intervenor-defendants.

October 20, 1977—Amendment to complaint filed by plaintiffs in C.A. 77-1647.

October 21, 1977—Response to statement of issues filed by plaintiffs in C.A. 77-1647.

October 24, 1977—Cross motions for summary judgment heard and taken under advisement.

October 28, 1977—Administrative record filed.

November 22, 1977—Memorandum Opinion and Order declaring certain action by Secretary of Commerce to be arbitrary and capricious and an abuse of dis-

cretion in violation of 5 U.S.C. 706(2)(A); granting plaintiffs motions for summary judgment in part; denying defendants' and intervenor-defendants' motion for summary judgment in part; remanding case to the Secretary for reconsideration in accordance with the memorandum opinion within 45 days; setting status call for 11-30-77, 9:30 a.m.

November 29, 1977—Motion for amendment of order and other relief filed by plaintiffs in C.A. 77-1647.

November 30, 1977—Status call and hearing on motion to amend order. Order filed granting plaintiffs' motion to amend order and dismissing remaining claim of plaintiffs.

December 2, 1977—Notice of appeal filed by plaintiffs in C.A. 77-1647.

December 29, 1977—Notice of appeal filed by plaintiff in C.A. 77-1645.

January 30, 1978—Notices of appeal filed by intervenor-defendants in both cases.

October 16, 1978—Argument before court of appeals.

February 6, 1979—Opinion and judgment of the Court, and dissenting opinion of Judge Bazelon, filed.

March 22, 1979—Orders entered denying petitions for rehearing and suggestions for rehearing en banc.

April 3, 1979—Order filed by Clerk vacating order of March 22 denying suggestions for rehearing en banc and entering amended order denying suggestions for rehearing en banc.

April 19, 1979—Order filed granting motions for stay of mandate until May 1, 1979.

April 30, 1979—Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on April 30 in S.C. No. 78-1651.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1645

SHELL OIL COMPANY,
(a Delaware Corporation)
One Shell Plaza
P.O. Box 2463
Houston, Texas 77001
(713) 241-6492

Plaintiff,

v.

JUANITA M. KREPS
(Individually and as Secretary of the United States Department of Commerce acting in her official capacity). United States Department of Commerce, 14th and E Streets, N.W., Washington, D.C. 20230,

and,

ROBERT J. BLACKWELL,
(Individually, as Assistant Secretary of Commerce for Maritime Affairs and as Chairman of Maritime Subsidy Board acting in his official capacity). United States Department of Commerce, 14th and E Strets, N.W., Washington, D.C. 20230,

and,

HOWARD F. CASEY,
(Individually, as Deputy Assistant Secretary of Commerce and as Member, Maritime Subsidy Board acting in his official capacity). United States Department of Commerce, 14th and E Streets, N.W., Washington, D.C. 20230,

and,

SAMUEL B. NEMIROW,
(Individually, as General Counsel, Maritime Administration and as Member Maritime Subsidy Board, acting in his official capacity). United States Department of Commerce, 14th and E Streets, N.W., Washington, D.C. 20230,

Defendants.

VERIFIED COMPLAINT

(Declaratory and Injunctive Relief)

I. *Jurisdiction and Venue*

1. The court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1346 and 2201.

2. Venue lies in the District of Columbia pursuant to 28 U.S.C. §§ 1391(a) and (e).

II. *The Parties*

3. Plaintiff Shell Oil Company ("Shell") is a Delaware corporation and its operations are primarily within the United States. Approximately 69 percent of Shell's stock is owned by Shell Petroleum, N.V., a Netherlands corporation, of which, in turn, 60 percent is owned by Royal Dutch Petroleum Company, a Netherlands corporation, and 40 percent by Shell Transport and Trading Company, a United Kingdom corporation.

4. Shell is currently the purchaser under a construction contract entered into on February 28, 1975 of two 188,500 deadweight ton San Diego class tankers being constructed by National Steel and Shipbuilding Company, San Diego, California. Both vessels are being built without government subsidies or financing aids. The approximate cost of each vessel is estimated at $92 million.

The first vessel is scheduled for delivery in January, 1978 and the second vessel in September, 1978.

5. The vessels being constructed for Shell are designed specifically for the Alaskan oil trade and meet or exceed the highest world and U.S. safety standards for tank vessels. Each vessel will have full segregated ballest to world (IMCO) standards, double bottoms and advanced cargo handling, safety and navigation features.

6. At delivery, title to each vessel now under construction will be transferred to a separate subsidiary of Bankers Trust Company, since Shell as a non-U.S. citizen corporation under the Shipping Act, 1916, as amended (46 U.S.C. 801, *et seq.*) cannot take title to the vessels. Shell will then time charter each vessel for an initial period of 23 years. The vessels are expected to be operated by Marine Transport Lines, Inc., a major independent U.S. ship operator.

7. The time charters to Shell will be set at such a rate not only to cover operating costs but as to repay Bankers Trust Company the cost of each vessel over the course of the 23 years period. Shell will be required to make these payments whether or not the vessel is operated, such charters being known as "hell or high water" charters.

8. The only commercial possibility for operation of the ships in the Alaskan oil trade is by subcharter to transport Alaskan crude oil owned by Standard Oil Company of Ohio ("SOHIO"), Atlantic Richfield Company ("ARCO"), or Exxon Corporation ("Exxon").

9. On information and belief, the ARCO and Exxon needs for transport of crude oil over the next three to five years can be met by unsubsidized vessels owned, being constructed or currently chartered by ARCO and Exxon themselves. SOHIO has evidenced its willingness

ot charter the STUYVESANT. On information and belief, SOHIO has the need for at least one ship for full time employment over the next three to five years in the Alaska trade, and is the only real potential subcharterer for Shell's vessels in the Alaska trade.

10. There is no commercially viable use for the Shell ships other than in the Alaskan oil trade.

11. Defendant Juanita M. Kreps is Secretary of the United States Department of Commerce. In this capacity, she is responsible for administration of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1101 *et seq.* ("Act"), and the regulations promulgated thereunder, 46 C.F.R. Part 200.

12. Defendant Robert J. Blackwell is Assistant Secretary of Commerce for Maritime Affairs and Chairman, Maritime Subsidy Board ("MSB"). In his capacity as Assistant Secretary, the Secretary has delegated to him responsibility for administration of specific duties under the Act, including management of the Federal Ship Financing Program authorized by Title XI of the Act, 46 U.S.C. § 1271 *et seq.* (1976). In his capacity as Chairman, MSB, the Secretary has delegated to him responsibility, in concert with the two remaining members of the Board, for managing the Construction-Differential Subsidy ("CDS") Program authorized by Title V of the Act, 46 U.S.C. § 1151 *et seq.* (1976).

13. Defendant Howard F. Casey is Deputy Assistant Secretary of Commerce and Member, MSB. As an MSB member he participates in the management of the CDS Program.

14. Defendant Samuel B. Nemirow is General Counsel, Maritime Administration and Member, MSB. As an MSB member, he participates in the management of the CDS program.

III. *Cause of Action*

15. Pursuant to Title V of the Act, 46 U.S.C. § 1151 *et seq.*, the Maritime Subsidy Board is empowered to award persons building new vessels for use in the "foreign commerce of the United States" a "construction-differential subsidy." The CDS program permits the United States-flag shipping industry to compete in United States foreign trade by lowering the effective construction costs of United States-flag ships. This permits United States-flag ships to offer in charter rates which are competitive with those charged by foreign-flag vessels, which were built in foreign shipyards at lower costs due to lower wages or material costs or subsidies from their own governments.

16. Section 501 of the Act, 46 U.S.C. § 1151, provides for the payment of CDS for ships to be used in the United States foreign trade. Section 506 of the Act, 46 U.S.C. § 1156, provides that owners of vessels for which CDS has been paid must contract to use the vessel only in U.S. foreign trade or in limited domestic service associated with such foreign trade, or in temporary use in domestic trade for no more than six months in any one year upon a determination that such temporary use is "necessary and appropriate to carry out the purposes" of the Act. Section 506 reads, in relevant part:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade . . . The [Board] may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the [Board] may determine that such transfer is necessary and appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the [Board], upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the [Board] as such temporary period bears to the entire economic life of the vessel.

17. While section 506 would thus allow a CDS vessel to be used in the Alaskan trade for a period of six months, it also protects Shell against competition from CDS vessels in the Alaskan trade for any period longer than six months in any one year.

18. The MSB has promulgated regulations under section 506 further limiting the circumstances under which CDS vessels may be used in the domestic trade for purposes of carrying Alaskan crude oil. 46 C.F.R. Part 250, 42 Fed. Reg. 33035 (June [illegible], 1977). These regulations incorporate the statutory six month limitation on waivers and, in addition, restrict waivers to the use of subsidized vessels in the Alaska-Panama Canal segment of the Alaska to U.S. Gulf Coast trade. The restriction is based on a specific administrative finding that sufficient unsubsidized vessels will be available to handle all other movements of Alaskan oil:

> The Maritime Administration has determined that suitable tank vessels, built without CDS appear to be available to serve the Alaska-West Coast trade and the Panama Canal-Atlantic/Gulf Coast trade.

19. Section 27, Merchant Marine Act, 1920, as amended, 46 U.S.C. § 883 (1976), provides that only vessels constructed in the United States may engage in domestic trade (trade from one point to another in the United States). Thus, no CDS is necessary to compensate for lower construction costs in foreign shipyards and none is provided for by act of Congress.

20. Pursuant to Title XI of the Merchant Marine Act, 42 U.S.C. § 1271 *et seq.*, (1976), the Assistant Secretary is authorized to provide loan guarantees for United States-flag vessels. The shipowner sells bonds which the Government guarantees in case of default. The vessel collaterializes the debt. This program is designed to provide low-cost financing for vessel owners. Section 1274(b)(2) provides that financing under this program shall not exceed 87.5 percent of cost for vessels constructed without CDS and 75.0 percent for CDS vessels.

21. On June 20, 1972, MSB Seatrain Shipbuilding Corp. ("Seatrain"), and Polk Tanker Corporation ("Polk"), executed CDS contracts for a 225,000 deadweight ton tanker to be called the STUYVESANT. Pursuant to Board Contract No. MA/MSB-165, Polk, as the vessel purchaser, agreed to operate the STUYVESANT in U.S. foreign trade, as required by section 506 of the Act. Pursuant to Board Contract No. MA/MSB-164, MSB agreed to pay Seatrain CDS funds. Polk and Seatrain are wholly owned subsidiaries of Seatrain Lines, Inc.

22. On information and belief, between the inception of its CDS contract, and September 23, 1977, Seatrain received some $30,156,529 in CDS payments.

23. The construction cost of the STUYVESANT is approximately $70,180,428.

24. On July 8, 1977, Polk filed with MSB a request that the domestic trade restrictions of section 506 be waived with respect to the STUYVESANT, then nearly ready for delivery, for a period of three years, provided a pro rata portion of CDS was repaid. The request stated that if a waiver were granted, the STUYVESANT would be chartered to the SOHIO Petroleum Corporation ("SOHIO") for use in the Alaska Oil trade. (The request is attached hereto as Exhibit A and incorporated herein by reference.)

25. The MSB, by published notice, opened a Docket, S-565, for the Polk request and invited public comment, 42 Fed. Reg. 37229 (1977).

26. On August 8, 1977, Plaintiff Shell, among others, filed comments that the Polk request was beyond the lawful authority of MSB.

27. Polk apparently modified its request on August 25, 1977, by a letter to the MSB not made available to, or served on, Shell.

28. By two letters dated August 31, 1977, without notice to or service on Shell, the Assistant Secretary and the MSB ruled that Polk could operate the STUYVESANT in domestic trade without limitation, provided that the CDS was repaid over 20 years pursuant to an interest bearing promissory note secured by a third preferred ship mortgage on the vessel. The letters did not require payment of any interest on the CDS received by Seatrain for the approximate 5 year construction period. The letters further provided that Polk's eligibility for guaranteed debt financing under Title XI of the Act would be determined according to a construction price reflecting the full value of the CDS to be repaid, even though none of the CDS had in fact been repaid and would not be fully repaid for a period of 20 years. By so providing, the Assistant Secretary and the MSB has permitted Polk to "double finance" the CDS portion of the construction price. Consequently Polk and Seatrain will have received funds amounting to approximately 120 percent of the vessel's construction costs and exceeding the 87.5 percent lending limit of Title XI. (The letters are attached hereto as Exhibits B1 and B2 and incorporated herein by reference.)

29. The letters cite no legal authority for the MSB action. On its face, the action is plainly in conflict with numerous provisions of the Merchant Marine Act and

underlying regulations, and Defendants are wholly without power to take the action described above.

30. The Secretary's regulations, 46 C.F.R. § 202.1 (1976), provide that an MSB order becomes final in 20 days unless (1) the Secretary reverses or suspends it or (2) an interested party requests Secretarial Review within 10 days. If a party requests review within 10 days, another party has five days to oppose review. Whether or not review is opposed within five days, the Secretary has an additional 10 days to act (or 25 total days after the Assistant Secretary of MSB action). If the Secretary does not reverse or stay the action within that time, it becomes final.

31. Shell filed a timely request for review on September 12, 1977, the first business day following the tenth day after August 31, 1977. If the request was timely, the Assistant Secretary and the MSB orders become final on September 26, 1977, if the Secretary fails to act or declines to review the orders, or such sooner date on which the Secretary approves the orders.

32. Polk, in its opposition to Shell's request filed September 14, 1977, stated to the Secretary that although the Assistant Secretary and MSB letters approving the waiver of CDS restrictions on the STUYVESANT were dated August 31, 1977, the "action" took place on August 30, 1977. If this argument is correct, the Assistant Secretary and MSB order became final on September 19, 1976. Polk has informed the Secretary that it, Seatrain, SOHIO, and General Electric Credit Corporation, a third party involved in the financing, have scheduled a closing for the STUYVESANT on September 23, 1977.

33. The MSB decision to waive CDS restrictions on the STUYVESANT and the failure of the Secretary to reverse the MSB decision is arbitrary, capricious, an abuse of discretion, and contrary to the law in that:

a. it is in violation of the Merchant Marine Act of 1936, as amended, and regulations promulgated thereunder;

b. it is based upon the Defendants' unlawful and arbitrary interpretation of the Merchant Marine Act of 1936, as amended;

c. it effectively denies Shell property without due process of law.

34. Shell will be immediately and irreparably harmed by the implementation of the Assistant Secretary and MSB rulings and the resulting consummation of the STUYVESANT transaction which contemplates a three-year charter to SOHIO. SOHIO is the only potential subchapter for Shell's vessels.

35. Shell has exhausted all administrative remedies.

IV. *Prayer*

WHEREFORE Plaintiff prays as follows:

a. That the Court enter a judgment declaring that defendant MSB's entry and the defendant Secretary's approval of the August 31, 1977, decisions of the MSB regarding the repayment of CDS subsidy and the removal of any restrictions prohibiting the STUYVESANT from being used in domestic trade are arbitrary and capricious, an abuse of discretion and otherwise unlawful;

b. That the Court enter an order prohibiting, restraining, and enjoining Defendants from implementing, now or in the future, the MSB's decision with respect to the STUYVESANT.

c. That the Court enter a judgment declaring that Defendant Secretary or her designated representative, Defendant Assistant Secretary are without power to authorize or approve financing guarantees on the STUYVE-

SANT under Title XI of the Act, or to commit to guarantee financing on the STUYVESANT under Title XI of the Act in accordance with the Assistant Secretary's letter of August 31, 1977.

d. That the Court enter an Order prohibiting restraining and enjoining Defendant Secretary or her designated representative, Defendant Assistant Secretary from authorizing or approving financing guarantees on the STUYVESANT, or committing to guarantee financing on the STUYVESANT under Title XI of the Act in accordance with the Assistant Secretary's letter of August 31, 1977.

e. That the Court enter such further temporary and preliminary orders as may be necessary to preserve Plaintiff's rights;

f. That the Court enter such further and order relief as the Court may deem necessary and appropriate in the circumstances of this case.

Respectfully submitted,

/s/ Stephen N. Shulman
STEPHEN N. SHULMAN

/s/ Joseph A. Artabane
JOSEPH A. ARTABANE

/s/ Mark C. Ellenberg
MARK C. ELLENBERG
CADWALADER, WICKERSHAM & TAFT
11 Dupont Circle, Suite 450
Washington, DC 20036
(202) 387-8100

Washington, D.C.: ss

AFFIDAVIT OF VERIFICATION

I, THOMAS J. LENGYEL, being duly sworn, depose and say:

1.

My name is Thomas J. Lengyel. I am the Manager, Marine Department of the Transportation and Distribution Department, Shell Oil Company, One Shell Plaza, Houston, Texas.

2.

In my employment with Shell, I am responsible for the implementation of all corporate plans necessary to provide marine transportation for Shell Oil Company and Shell Chemical Company.

3.

In the course of my employment with Shell, I have become personally familiar with the facts relating to the transportation activity of Shell Oil Company as it relates to the foregoing Complaint.

4.

I have read the foregoing Complaint (Declaratory and Injunctive Relief) and know the contents thereof. The facts stated which I know of first hand knowledge are true and those stated upon information and belief, I believe to be true.

/s/ Thomas J. Lengyel
THOMAS J. LENGYEL

Subscribed and sworn to before me this 22nd day of September, 1977.

/s/ Shawn E. Kearsey
Notary Public

My Commission Expires August 31, 1982.

EHXIBIT A

SEATRAIN LINES

1 Chase Manhattan Plaza
New York, New York 10005

HOWARD M. PACK, *President*

July 8, 1977

Honorable Robert J. Blackwell
Assistant Secretary for Maritime Affairs
United States Department of Commerce
Room 3898-B
Washington, D.C.

RE: *Polk Tanker Corporation*

Dear Sir:

Seatrain Shipbuilding Corp. an affiliate of Seatrain Lines, Inc., is owner of the VLCC Stuyvesant, being constructed for Polk Tanker Corporation ("Polk") at the Seatrain shipyard. Polk, on its behalf and that of any successor in interest, as owner or bareboat charterer, hereby requests approval of the Assistant Secretary ("the Secretary") of a time charter with The Standard Oil Company, an Ohio Corporation ("Sohio") for operation of the Stuyvesant in the Alaska (domestic) trade for a period of three years from date of delivery of the vessel. In return, Polk, or such successor in interest, would agree to repay or cause to be repaid, to repay, on a monthly basis during the period of the time charter, an amount which bears the same proportion to the construction-differential subsidy paid by the government to Seatrain Shipbuilding Corp. in respect of the construction of the Stuyvesant as the period of operation under the time charter bears to the entire life of the vessel. The Secretary is requested to grant this permission pursuant to the discretion vested in him by § 207 of the Shipping Act, 1918, ["MMA"] as amended ("the Act").

Polk entered in a contract in Construction Differential Subsidy for the Stuyvesant on June 30, 1972. At that time prospects for the employment of the vessel in the foreign trade appeared promising. Polk undertook to build the vessel in the expectation that a long-term charter would become available before completion of the vessel. Since that time, however, circumstances entirely beyond the control of Polk or its affiliates have made such a charter an impossibility. There is, at present, no possible way in which the vessel could be utilized in the foreign trade of the United States. Even if a charter were available, current rates would preclude any return to the vessel for interest payment or amortization.

As the Assistant Secretary is aware, due to the worldwide drop in tanker rates, Polk and its affiliates, including Seatrain Lines, Inc. and Seatrain Shipbuilding Corp. were faced with short-term cash problems which required the temporary closing of the Seatrain Shipyard, and the laying off of substantially all of its employees, and jeopardized the continuation of Seatrain's other operations.

Seatrain's short-term problems were resolved at that time through the negotiation of a loan guaranteed by the Economic Development Administration. That loan guarantee was collateralized in part, by pledges and security derived from the expected value, at completion, of the Stuyvesant. MARAD and the EDA valued the collateral based upon their expected use of the vessel in the Alaska trade.

The vessel was originally financed with $30,200,000 in Title XI insured debt financing. Level semi-annual debt repayment of $1,528,000 (plus or minus $5,000) commenced November 1, 1975. There is currently $28,845,000 insured indebtedness outstanding on the vessel.

Seatrain Shipbuilding Corp. has outstanding notes payable to banks due in 1980, 1982 and 1983 totaling $77,-

000,000. The Stuyvesant will be looked to for repayment of half this amount, or $38,500,000.

In order to arrange repayment of this indebtedness, substantially all of which is insured by the Department of Commerce, the vessel must be chartered. Seatrain has arranged a three-year time charter to Sohio for use in the Alaska trade at $5.40 per DWT. This time charter will generate a net cash flow sufficient to service the indebtedness on the vessel, including the second mortgage which the vessel would carry as part of a sales transaction, and the annual repayment of the pro rata portion of CDS. In addition it would generate a substantial net cash flow over the three-year charter after debt service and CDS repayment which would be available for deposit in a restricted fund to help ensure debt repayment in years following the expiration of the time charter.

Upon execution and approval of the charter, Polk would negotiate for the sale of the vessel in a leveraged lease transaction. The purchase price is to be approximately $86,000,000; financing will include the existing Title XI debt, an insured second mortgage on the vessel, and the equity owner's cash contribution.

The sale of the vessel by Polk will generate approximately $26 million in cash. Pursuant to the terms of the agreement with the equity owner, this will be placed in an interest-bearing fund to protect the equity owner against loss in the event of default. As the amount required to indemnify the equity owner declines, the amount in the fund will become available to repay the indebtedness on government insured loans, and for the building of reserves for future repayment. Thus virtually all the net cash proceeds of the charter and the sale will be utilized to retire the government insured indebtedness and reduce the government's exposure to collection on its guarantees.

The Secretary's permission for Polk to utilize the vessel in the domestic trades is necessary for the realization of the charter and the sale revenues. Without the charter no sale is possible.

Conversely, the failure to approve the proposed time charter could trigger a default and subsequent major loss to the government. Unless the Secretary approves the proposed contract amendment, allowing Polk or its successor to utilize the vessel in the domestic trade, Seatrain faces the possibility that it will be unable to continue the repayment of the Title XI insured debt, and will be forced to default on its obligations in this respect. Thus the government faces a situation involving the very real possibility of default with respect to approximately $116,000,000 in debt insured by the Department of Commerce.

In addition to the potential loss to the government if Seatrain defaults, the Seatrain Shipyard would probably be closed. This would result in the loss of over 2,500 jobs in New York City and the loss of a valuable shipbuilding facility. Approximately 85 percent of the yard's work force are members of disadvantaged minority groups. Seatrain's experience with the previous yard closing demonstrates that the vast preponderance of these employees are not readily re-employable and will require government funded benefits.

On the other hand, the yard, if kept open, is a going facility, generating new jobs and productively employing thousands of persons in the generally depressed New York City area. The yard is attracting new orders, and will continue, on a self-sustaining basis, to help carry out the mandate of Section 101(e) of the Act to maintain efficient facilities for shipbuilding.

The remainder of this memorandum discusses the authority of the Secretary of Commerce to enter into the proposed transaction under § 207. The basis of this argu-

ment is that the language concerning preservation and improvement of collateral in § 207 is an independent grant of authority which gives the Secretary broad power to protect the government's collateral. In order to invoke this provision of § 207, the Secretary must be faced with a realistic possibility of default, an expected economic loss on default, and an economically viable method for avoiding that default. These circumstances are present here. The Secretary, therefore, has the discretion to avoid a default through the approval of this request.

I. CONGRESS GRANTED THE SECRETARY SPECIFIC AND INDEPENDENT AUTHORITY UNDER § 207 TO "PROTECT, PRESERVE OR IMPROVE THE COLLATERAL HELD . . . TO SECURE INDEBTEDNESS"

Section 207 of the Act reads, in relevant part, as follows:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, *or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness*, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." [Emphasis added.]

In plain terms, § 207 sets forth a specific grant of authority empowering the Secretary, to "protect, preserve, or improve" its collateral. Under that section, this grant of authority appears wholly apart from the more general reference to the other "activities authorized by this Act," and was intended by Congress as an addition to the authority otherwise available to the Secretary under other provisions of the Act. In fact, in 1938, Congress amended § 207 to explicitly provide for this authority,

which was deemed necessary for the sound and efficient administration of the Act and for protection of the government's interests generally. It is precisely in circumstances such as those giving rise to this application that the Secretary's authority under § 207 was designed to be exercised. For unless the Secretary acts to preserve and improve its collateral in these circumstances, the government could incur substantial liabilities on its loan guarantees.

On the other hand, the approval requested here will clearly protect and improve the Secretary's collateral. The vessel must, in the immediate future, be used in the domestic trade. Currently available foreign charters would not make the government whole in the event of default. The vessel's value, and therefore the government's collateral, depends on its operation in the domestic trade; the charter for which approval is sought will therefore not only protect the government's collateral by preventing a default, but will improve it to the point where the government will have to face neither the prospect of a laid-up, unchartered asset, nor a protracted default proceeding.

The legislative history of § 207 underscores the importance attached by Congress to this specific and independent grant of authority for the preservation of collateral. In its Report, the Senate Committee on Commerce explained the amendment to § 207 as follows:

> "Section 207 of the Act now provides that 'the Commission may enter into such contracts upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter'. The amendment adds that it 'may make such disbursements as may, in its discretion be necessary 'to protect, preserve, or improve

> the collateral held by the Commission to secure indebtedness', as is the practice in the private corporation." S. Rep. No. 618, 75th Cong. 3rd Sess. (1938)

Prior to the 1938 amendments, the Act made no mention of any authority to "protect, preserve or improve" collateral; the Secretary was arguably foreclosed under § 207 from entering into contracts for that purpose. In other words, the "activities authorized by this Act" arguably did not include the preservation of collateral. This was obviously a serious gap in the Secretary's overall authority under the Act. In response, Congress amended § 207 to clearly and unequivocally provide the Secretary the authority to "protect, preserve or improve" collateral. This additional grant of authority was designed to supplement the other "activities authorized by this Act", and to correspondingly enlarge upon the scope of the Secretary's contractual authority.

It is therefore evident from a straight-forward reading of § 207 and its history that it was Congress' intent to supply the Secretary with authority under the Act to protect the government's collateral. Nor was this Congressional intent lost on those courts which have subsequently reviewed § 207, its history and its significance. As the United States District Court for the District of Columbia has stated, upon rejecting a narrow construction of § 207:

> It seems obvious from these reports that the draftsman was in doubt as to whether or not a contract 'to protect, preserve', etc., collateral was within the 'activities authorized by this act' even though the draftsman had so intended it; therefore the amendment addition was in order to make this certain. The scope of authority which may or may not have included such a purpose previously certainly included it thereafter.

> . . . [Plaintiff's contention is] to say that in constructing the word 'preserve', in Sec. 1117 the Court should find the interest of Congress to be that the Commission or any private corporation with like powers must as a rescuer of its collateral sit idly by and watch while all is lost. This does not make sense." *Dollar* v. *Land*, 82 F. Supp. 919, 923, f.n. 1. (D.D.C. 1948), rev'd on grounds that sovereign immunity not applicable, 81 U.S. App. D.C. 28, 154 F.2d 307 (1946) aff'd 330 U.S. 731 (1951).

Similarly, § 207 empowers the Secretary to take the action requested in this application. Pursuant to its authority under that section, the Secretary need not "sit idly by and watch while all is lost."

II. THE LIMITATIONS ON THE SECRETARY'S ACTION UNDER THE GENERAL AUTHORITY OF § 207 ARE NOT APPLICABLE WHEN THE SECRETARY ACTS TO PROTECT, PRESERVE, OR IMPROVE COLLATERAL

On a few occasions the Comptroller General has limited plans to utilize § 207 where there appeared to be a conflict with other provisions of the Act. In none of those cases, however, was the question of the protection, preservation or improvement of collateral in question.

It is not the applicant's contention that § 207 as a whole is a general license to avoid the terms of the Act whenever the Secretary finds it convenient to do so. The Comptroller General has ruled out such an interpretation. The Comptroller General's limitations, however, have been imposed when the Secretary has sought to utilize the general authority of § 207 to make contracts or disbursements "necessary to carry on the activities authorized by this Act" in contravention of other terms of the Act. For example, in the Opinion of the Comptroller General concerning American President Lines, B-135884, 38

Comp. Gen. 722 (1959), a plan was disapproved whereby the Secretary would, through actions as an escrow agent, undertake liabilities in excess of those authorized by Title XI as then in effect. The justification offered by the Secretary for that undertaking was that it would aid in carrying out the policies expressed in § 101 of the Act. In ruling that the language in § 207 limited the Secretary to activities authorized by the remaining provisions of the Act, the Comptroller General was clearly on firm ground. The language of the first part of § 207 cannot be a mandate for overruling the balance of the Act. Such a reading would leave the remaining language in the Act with little purpose.

Similarly, in 1952 the Comptroller General rejected the Secretary's contention that the Comptroller General could not oversee the activities of the Maritime Administration because of the broad language in § 207 giving the Secretary authority to carry out the policies of the Act. The Comptroller General asserted that the remaining language of the Act limited the Secretary's actions. Against the Secretary's assertion of unfettered license to ignore the Act, it is hard see how a different result could have issued. The much more narrow authority to protect, preserve, or improve collateral, however, was not in issue. Opinion of the Comptroller General concerning sales under the Merchant Marine Act of 1936. As amended, B-58323, 31 Comp. Genl. 695 (1952).

The language in the Act allowing the Secretary to protect his existing investment suffers no such limitation. By giving that language independent meaning to act in any emergency where the likely alternative could be default, the Secretary is not rendering the remaining language in the Act meaningless; absent a threat to the collateral, the Secretary's actions are limited to the express or implied terms of the Act.

The Comptroller General has recognized the need to give § 207 independent meaning in order to protect the government's collateral. In the Opinion of the Comptroller General concerning the SS Matsonia, B-151860, 43 Comp. Gen. 98 (1963), the Comptroller General found, under the authority of § 207 to protect, preserve and improve collateral that the Secretary could reschedule debt, notwithstanding language in § 1106 which might have prohibited such an action. The Comptroller General specifically said that under such circumstances the Act must be construed so as to effectuate its policies and purposes, and so as to avoid rendering § 207 meaningless. A similar interpretation is warranted here.

III. CONGRESS INTENDED THAT THE SECRETARY'S CONTRACTUAL AUTHORITY UNDER § 207 BE BROADLY CONSTRUED.

Section 207 authorizes the Secretary to contract to "carry on the activities authorized by this Act . . . in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." As the legislative history makes clear, it was Congress' intention that this analogy to the powers of a private corporation be construed as a conferral of the broadest contractual authority. The analogy employed by the drafters was designed to ensure the most expansive reading of the powers granted under § 207. As the House Report on the 1938 amendments stated in analyzing § 207:

> "The amendment (empowering the Commission to 'preserve, protect or improve' collateral) is designed to make clear a power which it is thought already existed in the Commission but about which some doubt has been expressed. Under the Act, the Maritime Commission has all the general and implied powers of a business corporation. H.R. Rep. No. 1268, 75th Cong. 3rd Sess, at 17. (1938)

Furthermore, judicial construction of the authority granted under § 207 has been similarly liberal, reflecting the thoroughly expressed, and commonly understood, legislative intent:

> "First of all as to the power [under § 207] of the Maritime Commission to enter into a transaction of the character it alleges it did, the court holds that it has the power to negotiate and to take absolute title to the stock in question. It was created, from a functional point of view, for the purpose of permitting the conduct of its business in a manner similar to that of private enterprise and free as a consequence of the ordinary inhibitions applied to the regular executive branches of the government.
>
> Its powers in this respect are similar to that of a business corporation." *Dollar* v. *Land*, supra, at 922. (citations omitted).

In short, Congress intended that the analogy to private corporations set forth in § 207 be understood as a broadly gauged grant of power to the Secretary. Congress chose to express its intention through analogy, and it is only as an analogy that the "private corporation" language of § 207 can be properly understood. Furthermore, if correctly viewed as an analogy, § 207 could sustain a restrictive reading only if Congress, in turn, is presumed to have selected an extremely poor and misleading analogy for its purposes. It is a commonplace of modern corporate law that a corporation's powers are too broadly construed, and that, in practice, few corporate acts are beyond "the scope of the authority conferred by its charter." Indeed, the traditional doctrine of *ultra vires*, which traditionally prohibited acts by a corporation beyond the "scope" of its charter, has experienced so steady and complete a decline that "within a few years the subject of *ultra vires* will be of historic value only." N. Lattin, *The Law of Corporations*, § 66 (2d ed., 1971). Con-

gress surely understood the import of the analogy which it selected, as corroborated by the unqualified emphasis of the legislative history on "all the general and implied powers of a business corporation" which the Secretary was intended to possess under § 207.

IV. THE SECRETARY HAS DISCRETION TO RESOLVE CONFLICTS BETWEEN § 207 AND § 506 OF THE ACT.

Polk and Seatrain are seeking the Secretary's approval of a three-year transfer of the Stuyvesant to service in the Alaska trade. A transfer of this duration is required to enable Seatrain to generate the cash needed to service the debt on the Stuyvesant, and to thereby avoid default on its insured loans. Since a default by Polk and Seatrain would trigger government liability on Title XI insured debt, the Secretary's approval of this transfer should lawfully be based on its authority under § 207 to "protect, preserve or improve" collateral.

The Act contains a grant of authority under § 506 allowing the Secretary to consent to the transfer to the domestic trades for periods up to six months per year. Arguably this grant of authority conflicts with the need under § 207 for the three year charter in order to generate sufficient revenue to prevent the default by Polk and Seatrain. This conflict may be more apparent than actual, however.

Previous interpretations of § 506 have found, where economically necessary, implied authority to transfer a vessel to the domestic trades notwithstanding the statutory time limitation, Opinion of the Comptroller General concerning the S.S. Santa Leonor, B-155039, 44 Comp. Gen. 130 (1964). While the statute was admittedly silent on the point, the Comptroller General found that so long as repayment of CDS was provided, the Secretary had

authority to allow transfer of the vessel to the domestic trade. Obviously, then, the time limitations imposed by § 506 do not fully occupy the field, especially where, as both for the Santa Leonor and the Stuyvesant, economic necessity requires a transfer for a longer period of time. The implied authority found by the Comptroller General in 1964 can be equally applicable to an exercise of this authority to transfer a vessel to the domestic trade pursuant to § 207 rather than § 506.

If, however, it is accepted that § 506 does conflict with approval of this charter, then the Secretary must resolve any such conflict in the interest of effective administration of the Act, through a careful weighing of the policies underlying both §§ 207 and 506 in light of the circumstances of the particular case. Conflicts and inconsistencies arise inevitably out of the legislative drafting process, particularly where, as here, the statute in question has undergone various amendments over a forty year history. These conflicts and inconsistencies must be resolved if the Secretary is to discharge its responsibilities under the Act.

Well accepted canons of statutory construction require a resolution which allows § 207 to serve the function intended by Congress. It is axiomatic that provisions within a statute should be construed harmoniously, and should not be permitted effectively to cancel out one another. This has been otherwise stated by the United States Supreme Court as "the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another." *United States of America* v. *Louisville and Nashville Railroad Company*, 235 U.S. 314, 326 (1914). It is a rule widely followed by the courts in matters of statutory construction. *See, R.V. McGinnis Theatres* v. *Video Independent Theatres, Inc.*, 262 F. Supp. 607, 613-614 (N.D. Okla.), *aff'd*, 386 F.2d 592 (10th Cir. 1967); *In*

Re Presault 130 Vt. 343, 292 A.2d 832, 834-835 (Sup. Ct. 1972); *Cooper Motors* v. *Commissioners*, 131 Colo. 78, 279 P.2d 685, 688 (1955).

In some instances, this rule of construction may require that where two provisions of a statute cannot be construed consistently or harmoniously under all circumstances, one such section must be interpreted to prevail or supersede the other under the particular circumstances involved. Since § 506 would conflict with the Secretary's ability to take an action necessary for the preservation of the collateral in this case, § 506 would have to give way to § 207.

An illustration of the approach urged upon the Secretary here can be found in *Commissioner* v. *Credit Alliance Corp.*, 316 U.S. 107 (1941). In that case, the Supreme Court confronted a conflict between § 27(f) and 27(h) of the Internal Revenue Act of 1936 governing the application of "dividends—paid credit" to a corporation making distributions in liquidation. The liquidating corporation in *Credit Alliance* was seeking this credit on distributions made to its parent company. Briefly stated, under the clear terms of § 27(f), the liquidating corporation was entitled to a dividends-paid credit on this distribution to its parent company, whereas under the equally clear terms of § 27(h), a dividends-paid credit under these circumstances was prohibited. The Court chose to resolve the conflict in favor of allowing the credit in the particular case before it, and stated as follows:

> "As above said, each of the subsections of § 27 deals with a specific and particular topic. Subsection (f) deals with 'distributions in liquidation' while subsection (h) deals with 'non-taxable distributions'. If (f) applies in this case, (h) is left to cover a substantial field of other sorts of distributions. We should, of course, read the two sections as consistent rather than conflicting, if that be possible. Here,

it is not only possible but begets no absurb or impractical result. We hold that (h) is not applicable to the facts of this case and that (f) is." *Commissioner* v. *Credit Alliance Corp., supra,* at 111-112.

The Court's approach in *Commissioner* v. *Credit Alliance Corp.* applies with equal force to the issue presented in this application. Here, if § 207 were viewed as controlling, the result would not be either "absurb or impractical." On the contrary, unless the Assistant Secretary exercises discretion by approving the charter of the Stuyvesant for a three year period, the policy underlying § 207 will be frustrated. Without approval of this charter, the possibility of improving the government's collateral is doubtful.

The exercise of the discretionary authority under § 207, moreover, not only effectuates the policy of improving the government's collateral, but also aids in carrying out the policies set forth in § 101. By protecting the government's collateral under § 207 the government will also assure the continuation of the shipbuilding facility, rather than the potential permanent loss of the facility. The approval would, therefore, not only satisfy the statutory standard of § 207, but the broader policies underlying the Act as well.

CONCLUSION

Section 207 confers upon the Secretary specific and independent authority to "preserve, protect or improve" the government's collateral. Congress intended this authority to be exercised in circumstances such as those present here, where there is a genuine and immediate threat to the government's collateral, but also an economically viable approach to the protection of that endangered collateral, as outlined above. If, under these circumstances, the Secretary is deemed powerless to act under § 207, the expressed Congressional mandate underlying that section would have little practical meaning or significance. For

these reasons, Polk requests that the Secretary approve its proposed time charter with Sohio for operation of the Stuyvesant in domestic trade for a period of three years.

/s/ Howard M. Pack
HOWARD M. PACK

[SEAL]

EXHIBIT B1

UNITED STATES DEPARTMENT OF COMMERCE

Maritime Administration
Washington, D.C. 20230

August 31, 1977
Polk Tanker Corporation
One Chase Manhattan Plaza
New York, New York 10005

Gentlemen:

For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states. The Economic Development Agency in June 1975 agreed to guarantee additional funding to Seatrain Shipbuilding Corporation to reopen its yard to complete this vessel taking into account the same possibility. In light of the fact that several years of work and negotiations have generated no other opportunities for employment of this vessel, and being persuaded that approval of the proposed CDS repayment and the time charter of the Sohio Petroleum Company will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation, the Maritime Subsidy Board (Board)/ Assistant Secretary of Commerce for Maritime Affairs (Assistant Secretary) with respect to the requests dated July 12, 1977 and August 25, 1977, from Polk Tanker Corporation (Polk) pertaining to the T. T. STUYVESANT, took the following actions on August 30, 1977:

I. By the Assistant Secretary:

A. Approved, pursuant to sections 9, 37 and 41 of the Shipping Act, 1916, as amended (the Shipping Act), the time charter by United States Trust Company of New York, as owner trustee, and Queensway Tankers, Inc., as charter owner, of the tanker Builder's Hull No. 102 (to be documented under U.S. flag and named STUYVESANT), to Sohio Petroleum Company, a Delaware corporation but not a citizen of the United States within the meaning of section 2 of the Shipping Act, for a period of three (3) years commencing on or about the date of Maritime Administration approval, for the carriage of crude oil and/or dirty petroleum products in permissible worldwide trade, upon the conditions: (1) that without the prior written approval of the Maritime Administration the vessel shall not be subchartered to aliens, except as may be permitted by General Order 59, 2d Revision, as amended; and (2) that the operating range of said vessel shall not include the Soviet Union, Latvia, Lithuania, Estonia, Czechoslovakia, Hungary, Bulgaria, Albania, North Korea, the Soviet Zone of Germany, Manchuria, the People's Republic of China, Cambodia, North Vietnam, South Vietnam, Cuba or Southern Rhodesia, unless otherwise permitted by regulations of the Department of Commerce.

II. By the Board:

A. Found, pursuant to section 501(a) of the Merchant Marine Act, 1936, as amended (the Act), that United States Trust Company, as owner trustee and Queensway Tankers, Inc., as charter owner, are acceptable transferees of the T. T. STUYVESTANT, subject to both companies demonstrating their U.S. citizenship, under section 2 of the Shipping Act, to the satisfaction of the General Counsel.

B. Approved, pursuant to Article 14 of Board Contract No. MA/MSB-165, the assignment of the T. T. STUYVESANT to United States Trust Company as owner trustee and the bareboat charter of the vessel to Queensway Tankers, Inc.

C. Authorized the repayment to the United States on the date of delivery of the T. T. STUYVESANT, of the total amount of construction-differential subsidy paid in connection with the construction of the vessel, including the cost of National Defense Features, as determined by the Maritime Administration, in the form of a promissory note issued by Polk and to be assumed by the United States Trust Company as trustee upon purchase of the vessel, payable in level installments of principal and interest, semi-annually in arrears for twenty years beginning on the date of delivery of the vessel, provided that:

(1) The note is secured by a preferred ship mortgage on the vessel to be given by the owner trustee in favor of the United States which will be subject and subordinate to a first preferred mortgage and second preferred mortgage to be given by the owner trustee to secure obligations insured and/or guaranteed under Title XI of the Act, in connection with financing the vessel.

(2) The note is also secured by the owner trustee's interest in (a) the bareboat charter; (b) the time charter; and (c) the Seatrain Security agreement.

(3) All documents related to the repayment of CDS have been found to be satisfactory, in form and substance, to the Office of the General Counsel.

D. Determined that interest is payable on the promissory note authorized in paragraph C above,

with interest thereon to be at the same rate borne by the second tier of Title XI debt from date of execution.

E. Authorized the amendment of Board Contract No. MA/MSB-165 to release the vessel owner from all restrictions, obligations and duties contained therein, except those contained in Articles 4 and 11 pertaining to the right of the Board to the engineering and design data for the vessel, and the purchase and requisition rights of the United States to the vessel pursuant to section 802 of the Act, respectively. It shall be understood that with respect to the compensation formula contained in Article 11, the amounts of CDS repaid pursuant to paragraph C above, shall be considered in the calculation of compensation.

F. Authorized the Assistant Secretary of Commerce for Maritime Affairs (the Secretary), on behalf of the Board, to accept or enter into the following documents:

1. Promissory Note from Polk;

2. Novation Agreement among United States Trust Company as owner trustee, Polk and the Secretary;

3. Security Agreement between United States Trust Company as owner trustee and the Secretary; and

4. Preferred Ship Mortgage (Third) between United States Trust Company as owner trustee and the Secretary

in substantially the form submitted, proof date August 25, 1977, or with such changes as the Secretary shall approve and delegated to the Assistant Administrator for Maritime Aids authority to take all

actions necessary in connection with the administration of the above mentioned documents.

Your attention is invited to the provisions of Department of Commerce Organization Order 10-8, section 7, and we ask that you indicate your acceptance of the above actions by signing, dating, and returning the enclosed copy of this letter.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

Enclosure

[SEAL]

EXHIBIT B2

UNITED STATES DEPARTMENT OF COMMERCE

Maritime Administration
Washington, D.C. 20230

August 31, 1977
Polk Tanker Corporation
One Chase Manhattan Plaza
New York, New York 10005

Queensway Tankers, Inc.
110 Wall Street
New York, New York 10005

Gentlemen:

With respect to the proposed sale of the STUYVESANT (Vessel) by Polk Tanker Corporation (Polk) to The United States Trust Company of New York (Shipowner), not in its individual capacity but solely as owner trustee under a Trust Agreement between it and General Electric Credit Corporation (GECC), and the proposed additional bond sale, you are advised that on August 30, 1977, the Assistant Secretary for Maritime Affairs (Secretary) took the following actions:

I. Approved the Shipowner, not in its individual capacity but solely as owner trustee under a Trust Agreement between it and GECC, as lessor under the lease financing arrangement.

II. Found that Cove Shipping, Inc. (Cove) possesses the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

III. Approved Queensway Tankers, Inc. (Queensway) as bareboat charterer and, found pursuant to Section 1104 (b) (1) of the Merchant Marine Act, 1936, as amended

(Act), subject to compliance with the requirements herein stated, and the execution of the Management Agreement required below, that Queensway and the Shipowner possess the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

IV. Approved the proposed sale and lease financing arrangement, whereby Polk will assign its rights and obligations under the construction contract for the Vessel to the Shipowner, pursuant to Section 8.01 of the Trust Indenture.

V. Required that the lease terms of the sale and lease proposal be subject to approval by the Maritime Administration including, but not limited to, the lease rate, indemnification, etc.

VI. Found under Section 1104(d) of the Act that the property or project with respect to which the additional guaranteed obligations will be issued remains, in his opinion, economically sound.

VII. Determined, pursuant to Sections 1101(f) and 1104(b)(2) of the Act, that the final actual cost of construction of the Vessel is as follows:

Construction Costs	$70,180,428
Net Interest	5,372,679
Total Actual Cost	$75,553,107

On this basis fixed the guarantee amount at $60,200,000, which amount does not exceed 87½% of the actual cost of the Vessel.

VIII. Found that on the basis of the repayment of construction-differential subsidy (CDS) the Vessel is eligible for a guarantee in an amount not to exceed 87½% of the actual cost of construction of the Vessel.

IX. Approved the amortization of the proposed additional obligations ($31,355,000) on a twenty year level debt service basis (equal payments of principal and interest).

X. Required Queensway to execute a Management Agreement with Cove and required that said Management Agreement be approved in form and substance by the Secretary.

XI. Required that at or prior to the guarantee closing the Economic Development Administration (EDA) subordinate its preferred position on the BAY RIDGE, presently being constructed at Seatrain, in favor of the Maritime Administration.

XII. Required that Chase Manhattan Bank, N.A., (Chase) agree to subordinate their position on the BAY RIDGE to the Maritime Administration and to EDA up to $40,000,000 even should the Letters of Credit issued by Chase for use with respect to the BAY RIDGE be drawn down.

XIII. Required that Queensway execute a Title XI Reserve Fund and Financial Agreement (Financial Agreement) in the form of our standard Financial Agreement dated December 1, 1974.

XIV. Required that Queensway deposit 100% of its profits into the Reserve Fund until it has accumulated an amount in the Reserve Fund and Seatrain Security Fund equal to 50% of the outstanding principal balance of the First and Second Mortgage.

XV. Required that for purposes of Section 12 (negative covenants) of the Financial Agreement the working capital and net worth requirements be set at $11,027,700 for both.

XVI. Required that at or prior to the guarantee closing, the Shipowner have funds available equal to the difference between the outstanding indebtedness on the Vessel and the capitalizable cost of the Vessel (approximately $32.7 million).

XVII. Required that at the guarantee closing Queensway have working capital sufficient to supply the Vessel on its

initial voyage, obtain the necessary marine insurance, and pay the Title XI guarantee and insurance fees and that an officer of Queensway certify that Queensway has this amount.

XVIII. Required that for purposes of meeting the working capital requirement of Section 12 of the Financial Agreement, 50% of the amounts in the Reserve Fund will be counted towards working capital so long as the 100% deposit of profits requirement is in effect.

XIX. Required that Seatrain establish a Seatrain Security Fund and deposit into this fund from the escrowed equity investment of GECC plus its earnings any amounts in excess of those required to protect GECC.

XX. Determined that Seatrain will not have to make deposits into the Seatrain Security Fund if the amount on deposit in the Security Fund plus the amount in the Reserve Fund equals 50% of the outstanding indebtedness (relating to the First, Second, and Third Mortgages) related to the Vessel.

XXI. Considered the release of the Seatrain Security Fund to Seatrain if any of the following conditions are met:

(A) If Queensway should secure a time charter or contract of affreightment to an acceptable credit risk, as determined by the Secretary, equal to at least ½ of the remaining original term of the bareboat charter wherein (1) the charter hire is sufficient to service the bareboat charter hire and is paid on a hell-and-highwater basis, (2) the operating component of the charter hire is sufficient for all operating expenses, and (3) there is a reasonable profit to Queensway.

(B) If Queensway should secure a time charter or contract of affreightment meeting all the conditions in (A) above except that it was not for ½ of the remaining

original term of the bareboat charter, and if this time charter or contract affreightment plus the amount in Queensway's Reserve Fund assured the payout of at least 50% of the outstanding indebtedness of the Vessel at the end of the charter period.

(C) If the Vessel is sold to a buyer possessing acceptable substantial credit as determined by the Secretary.

(D) If Queensway were to merge into a company that has sufficient assets and credit, as determined by the Secretary, to service the bareboat charter hire.

(E) The presence of any other conditions or circumstances as determined by the Secretary which would give the Maritime Administration security in an amount at least equal to any of the four above stated conditions.

XXII. Required Queensway to (1) establish United States citizenship in form and manner prescribed in 46 CFR 355 within 30 days after date of this Commitment or this Commitment may be terminated by the Secretary at his sole discretion; provided, however, if a Commitment to Guarantee Obligation closing is scheduled to occur within said 30 days period, required such parties to establish United States citizenship at least 15 days prior to the Commitment to Guarantee Obligation closing and (2) submit satisfactory evidence of continuing United States citizenship on the date of Commitment to Guarantee Obligation closing, at all Guarantee closings and all Mortgage closings with pro forma evidence of citizenship to be submitted at least 10 days prior to the appropriate Commitment, Guarantee and/or Mortgage closing.

XXIII. Required the Shipowner, Polk, Cove, and GECC to submit satisfactory evidence of continuing United States citizenship at the guarantee closing.

XXIV. Required satisfactory evidence of Vessel insurance at least 10 days prior to the guarantee closing.

XXV. Required that any services performed by or for Queensway by or for an affiliated company be at a fair

and reasonable rate or approved by the Secretary as to fairness and reasonableness.

XXVI. Required that at least 5 days prior to the guarantee closing Queensway submit to the Secretary a financial statement certified by an officer of the company indicating all non-Title XI debt then in existence.

XXVII. Fixed the additional investigation fee authorized by Section 1104(f) of the Act at $39,193.75, less the $3,000 amendment fee previously paid, which amount must be paid within 30 days of the date of this action but in any event prior to the guarantee closing.

XXVIII. Required that the guarantee fee under the Second Mortgage and the insurance fee under the First Mortgage be fixed at ¾% until reduced by the Secretary based upon Queensway having secured a charter justifying the reduction.

XXIX. Authorized the Assistant Administrator for Maritime Aids to approve all appropriate documents and to take such other actions as may be necessary to effectuate the purposes of this action.

XXX. Required that all documentation be in form and substance satisfactory to the Secretary.

XXXI. Authorized the execution of this letter to Polk and Queensway which will constitute a Letter Commitment to Guarantee Obligations with respect to the sale of the Vessel and additional Title XI obligations, subject to the conditions contained herein, and required Polk and Queensway to accept the provisions hereof by signing and returning a copy to the Secretary.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. CA 77-1647

ALASKA BULK CARRIERS, INC.
Foot of Morton Avenue
Chester, Pennsylvania 19013
(Phone: 215/876-9121)

TRINIDAD CORPORATION
926 Public Ledger Building
6th & Chestnut Streets
Philadelphia, Pennsylvania 19106
(Phone: 215/574-3300)

v.

JUANITA M. KREPS, Secretary of Commerce,
U.S. Department of Commerce

MARITIME ADMINISTRATION,
U.S. Department of Commerce

MARITIME SUBSIDY BOARD,
U.S. Department of Commerce

ROBERT J. BLACKWELL, individually and as
Assistant Secretary of Commerce for Maritime Affairs,
Maritime Administrator and Chairman,
Maritime Subsidy Board, Maritime Administration
U.S. Department of Commerce

Street Address for all Defendants:

U.S. Department of Commerce
14th and E Streets, N.W.
Washington, D.C. 20235
United States of America

COMPLAINT FOR REVIEW OF AGENCY ACTION, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Jurisdiction

1. This is a civil suit for judicial review of unlawful actions of the Maritime Administration/Maritime Subsidy Board (1) lifting statutory restrictions governing the operation of a vessel built with federal subsidy; and (2) awarding unauthorized financial ("loan") assistance amounting to 27.2 million dollars so as to permit the SS STUYVESANT to operate in U.S. *domestic* trades which are open only to U.S.-built ships constructed without federal subsidy assistance, although the ship was built with the assistance of federal subsidy funds to enable it to compete with foreign flag ships in U.S. *foreign* trades. The court has jurisdiction pursuant to 28 USCA §§ 1331, 1333, 1337, 1651, 2201-2202 and under 5 USCA §§ 701-706. Venue is proper pursuant to 28 USC § 1391.

Plaintiffs

2. Plaintiff Alaska Bulk Carriers, Inc. is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in Chester, Pennsylvania. Alaska Bulk Carriers is the bareboat charterer of two recently-constructed United States-flag oil tankers, the PRINCE WILLIAM SOUND and the GLACIER BAY (ex JOSEPH D. POTTS), which were not built with federal subsidy. It is also committed to a third recently-constructed unsubsidized United States-flag oil tanker.

3. Plaintiff Trinidad Corporation is a corporation organized and existing under the laws of Delaware. It is engaged in the operation of bulk tank vessels some of which were built without federal subsidy and are used in the transportation of oil from Alaska.

Defendants

4. Defendant Juanita M. Kreps is Secretary of Commerce ("Secretary") and as such is responsible for administering the Merchant Marine Act, 1936. Defendant Robert J. Blackwell is Assistant Secretary of Commerce for Maritime Affairs and as such is also Maritime Administrator of the defendant Maritime Administration, a constituent agency of the Department of Commerce, and *ex officio* member of the defendant Maritime Subsidy Board ("MSB"), a constituent agency of the Maritime Administration ("MarAD") both constituent agencies and the Administrator having been delegated by the said Secretary of Commerce under existing departmental orders to perform certain duties in administering the said Merchant Marine Act, 1936. Department of Commerce Organization Order 10-8 (formerly 117-A and 25-2A), as amended, Pike and Fischer, SR 105:101. All defendants are officially resident in Washington, D.C.

Statutes Involved

5. The statutes involved are:

(a) The Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1101ff, particularly the provisions of Title V. This title authorizes, under certain conditions, the payment by the Government of construction-differential subsidy ("CDS") with respect to the construction of ships in United States shipyards for use in United States foreign commerce.

(b) 28 U.S.C. § 2201, § 2202 providing for declaratory judgment and injunctive relief;

(c) The provisions of the Administrative Procedure Act, 5 U.S.C. § 551ff and § 702 *et seq.*, particularly 5 U.S.C. § 704, providing for judicial review of Agency actions.

Domestic and Foreign Commerce

6. The domestic maritime commerce of the United States is the carriage by water of merchandise between points in the United States. Water carriage between U.S. and foreign points, or between foreign points only, is foreign commerce. By law (Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. § 883, commonly known as the Jones Act), only ships built in the U.S. and documented under the laws of the U.S. (i.e., U.S.-flag vessels) may operate in domestic commerce. There are no such restrictions on vessels engaged in foreign commerce.

Construction Sudsidy Program

7. In the absence of construction-differential subsidy, vessels engaged in foreign commerce would ordinarily be built in foreign, not U.S., shipyards. The costs of building vessels in U.S. shipyards are substantially higher than in shipyards of other maritime nations. The government's construction-differential subsidy program was established to enable U.S. citizens building ships for use in foreign commerce to use U.S. shipyards and still remain economically competitive with foreign shipowners. When a shipowner builds a vessel under Title V of the Merchant Marine Act, 1936, the federal government pays up to 50% of the cost of such vessel to offset the higher costs of U.S. construction as compared with foreign construction. By contrast, an unsubsidized shipowner operating in domestic trade must bear the full cost of vessel construction in U.S. shipyards. Since low-cost foreign-built vessels may not engage in domestic trade, there is no need for payment of construction-differential subsidy with respect to the U.S.-built vessels which engage in such trade.

8. Under the Title V construction subsidy program, ships built for operation in the domestic trades are not eligible for subsidy and ships which have been built with

subsidy may not be operated in the domestic trade. Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. § 1156, provides that the owner of any ship built with construction differential subsidy must agree that the vessel is to be operated exclusively in the foreign trade (except for certain intermediate stops at U.S. ports as part of foreign voyages and these exceptions are specifically enumerated in the statute). To meet emergencies or other special needs, the Secretary of Commerce has the discretion under Section 506 to permit CDS-built vessels to be *temporarily* transferred to the domestic trades for a short period (not exceeding six months in any year). Section 506 does not authorize—and does not empower the Secretary to authorize—either the transfer to the domestic trades of a CDS-built vessel for more than six months, or the permanent use of a CDS-built vessel in domestic trades.

9. There are only two situations wherein Section 506 permits a CDS-built vessel to be used in domestic trades —to make (1) incidental stops on a foreign voyage; (2) for a temporary period of 6 months or less. In those situations § 506 requires that a pro rata share of the construction subsidy be returned to the government. No statutory provision authorizes the Maritime Administration to remove the restrictions prohibiting the vessel's use in domestic commerce whether or not its action is conditioned on the payback of all unamortized construction subsidy.

10. Each grant of construction-differential subsidy generally involves the execution of three contracts: a construction contract between the shipowner and the shipyard, a contract between MarAd/MSB and the shipyard, and a contract between MarAd/MSB and the shipowner. The last contract incorporates numerous obligations of the shipowner in consideration of the CDS grant. The contractual commitment of the shipowner to

comply with the operating restrictions of Section 506 is set forth in a specific article in the contract. The contract provides that the provisions of the article incorporating the Section 506 restrictions "shall run with the title of the vessel and be binding on all owners thereof." A typical example of such an article from a tanker CDS contract (Article 9) is attached hereto as Exhibit A.

Title XI Guarantees

11. The Maritime Administration also promotes the U.S. shipbuilding industry and its merchant marine by providing guarantees which finance private borrowing at favorable interest rates. This program is authorized by Title XI of the Merchant Marine Act of 1936, as amended. The government insures obligations to pay ship construction costs for U.S. built and documented ships. Ordinarily, the agency takes a first preferred mortgage as security. Both subsidized and unsubsidized U.S. built ships may be insured—but while the agency may guarantee up to 87½% of the actual costs of construction of unsubsidized vessels, there are more stringent limits on its insuring obligations for subsidized ships.

The U.S.-Flag Tanker Industry

12. The U.S.-flag oil tanker industry consists of two physically and economically distinct fleets: (1) unsubsidized tankers operating in Jones Act (domestic) trades and (2) CDS-built tankers operating in foreign trades. Unsubsidized tankers generally cannot successfully compete against CDS-built—and foreign-built—tankers in foreign trades because of the higher costs of building ships in the U.S., and CDS-built tankers cannot lawfully operate in Jones Act trades, except in the limited circumstances permissible under Section 506.

13. Tanker rates (as reflected in charters and contracts of affreightment) in the Jones Act (domestic)

trades are higher than the rates for U.S.-flag tankers of the same type in foreign trade since the rates of the unsubsidized Jones Act carriers do not reflect the subsidy assistance granted to U.S. tankers which compete with foreign tankers in foreign trades. Jones Act tanker rates are set in the marketplace by competition among unsubsidized U.S.-flag ships, and are generally sufficient to provide a fair return to the unsubsidized tanker owner and to stimulate the construction of new tonnage, as market forces dictate.

14. An important new market for Jones Act tankers was created in the early 1970's when plans were laid, and Congressional authority was secured, for construction of the Trans-Alaska Pipeline System ("TAPS") through which Alaskan oil will be transported from the North Slope of Alaska to the Southern Alaska port of Valdez. Oil tankers are to carry the oil from Alaska to various destinations in the "lower 48" states beginning in late summer/early fall of 1977 when the North Slope oil is expected to move through the TAPS pipeline for oncarriage to the lower 48. The market responded to these economic developments by the placing of orders for the construction of unsubsidized tankers which could operate in the TAPS trade. As a result of the unauthorized actions of the defendants, as described below, the owners and charterers of unsubsidized tankers to be used in the TAPS trade are faced with imminent illegal and unfair competition from the CDS-built tanker fleet.

SS STUYVESANT

15. Seatrain Shipbuilding Corporation (Seatrain) of Brooklyn, New York is a shipyard building liquid bulk vessels. It is the recipient of construction differential subsidy amounting to approximately $27.2 million paid by MarAd/MSB for the construction of the SS STUYVESANT, a 225,000-dwt tanker under Construction Dif-

ferential Subsidy Contract No. MA/MSB-164 with the United States. The vessel is the subject of a Title V (subsidy) Contract No. MA/MSB-165 between MarAd/MSB and the owner, Polk Tanker Corporation (Polk) as the owner or prospective owner which contract includes the restrictions of Section 506 of the Merchant Marine Act, 1936, as amended, prohibiting the vessel's permanent operation in U.S. domestic trades. Additionally, the SS STUYVESANT was financed in 1972 with the payment of approximately $30.2 million of the debt insured by the United States Government through MarAd/MSB under Title XI of the Merchant Marine Act, 1936.

16. In addition to the Assistance given Seatrain by MarAd/MSB for the SS STUYVESANT, including (1) construction differential subsidy of upwards of 27.2 million paid by MarAd/MSB to Seatrain to meet costs of constructing the SS STUYVESANT and (2) the $30.2 million debt guarantee made by MarAd to secure financing for the vessel, the Department of Commerce has provided further financial assistance to aid the SS STUYVESANT. In June, 1975, the Economic Development Administration guaranteed loans in the amount of $77 million so that Seatrain and Polk could overcome financial difficulties which had led to the closing of Seatrain's yard. With this loan, Seatrain reopened its yard and completed the STUYVESANT; on information and belief, the loan guarantee was collateralized by pledges and security derived from the expected value of the SS STUYVESANT on completion. On information and belief, MarAd and EDA valued this collateral based upon the expected use of the vessel in the Alaska trade—despite the fact that the law forbids the operation of a vessel built with CDS in domestic trades.

17. On information and belief Seatrain Lines, Inc. (the parent company of the shipyard and the shipowner) made the decision to build the SS STUYVESANT and

commenced its construction "on speculation." That is, the shipowner, Polk, did not have a long-term charter (or any charter, for that matter) in hand during the lengthy construction period when construction began. Polk and Polk's parent were thus "speculating" that an appropriate charter for use of the vessel in foreign commerce would materialize.

18. Despite the lack of a charter or charters, the shipowner in 1972 or earlier applied for and received the federal maritime aids described in paragraph 18, above (over $27 million in an outright subsidy grant and over $30 million in Title XI guarantees). Title XI at § 1104 (d), and Title V at § 501, each require that the agency make a finding that the project for which the aid is given is economically sound and viable. On information and belief, MarAd/MSB has never granted aid even closely approximating the magnitude of aid granted to Seatrain and Polk without requiring, in order to make the statutory finding, that the shipowner have a long-term charter insuring that the vessel will be employed profitably in lawful trade and will generate sufficient funds to service the U.S.-guaranteed debt and to justify the grant of subsidy.

19. On information and belief, MarAd/MSB and the shipowner/shipyard interests gravely miscalculated the likelihood that a profitable charter for the use of the SS STUYVESANT in non-domestic trade would materialize, for no such charter has materialized.

20. By 1974, international tanker rates had declined precipitously from levels which had been reached just prior to the Arab oil embargo in 1973, thus further reducing the likelihood that a profitable non-domestic charter for the STUYVESANT would even be executed.

21. In June 1975, despite depressed market conditions and the lack of a charter, the Department of Commerce,

through its Economic Development Administration, guaranteed massive additional loans to Seatrain (as alleged in paragraph 19), the partial collateral for which consisted, on information and belief, of a $38.5 million security interest in the vessel in favor of the United States.

22. In early 1975, prior to the issuance of $77 million in U.S. guarantees in 1975 for the benefit of Seatrain, officials representing the EDA, MarAd/MSB and Seatrain corporate interests met and discussed the eventual use of the vessel in the Alaska trade despite the vessel's CDS status, and, on information and belief, the government officials assured Seatrain that the agency or agencies could accomplish certain official acts purportedly enabling Seatrain or successor interests to operate the vessel in the Alaska domestic market. Those official acts have indeed taken place and are the acts complained of herein.

23. At the time of the discussion alleged in the preceding paragraph and up to the date of the actions complained of herein (August 31, 1977), neither MarAd/MSB nor EDA had ever given any notice to the public, and to the domestic tanker industry and plaintiffs in particular, that there even existed a possibility that MarAd/MSB, EDA, and Seatrain interests would seek to have the vessel employed in the Alaska trade and to have the CDS contract cancelled fully.

24. During the period of the government's and Seatrain's public silence, both shipyards and shipowners in the domestic tanker industry, including plaintiffs herein, expended massive funds (without aid of federal sudsidy) to build and buy ships based on projected rates and projected total capacity which did not—and could not—include the competition of the SS STUYVESANT (as well as its sister vessel the SS BAY RIDGE).

Maritime Administration/Maritime Subsidy Board Actions

25. On July 20, 1977, MarAd/MSB published in the Federal Register notice of a request for approval of the operation of the SS STUYVESANT in the Alaska trade for a period of three years. This request had been made by Polk Tanker Corporation and Seatrain Shipbuilding Corporation. The Seatrain-Polk application asked for the approval of a three-year time charter to Standard Oil Company (Sohio), an Ohio corporation. Publication of the request was made pursuant to agency regulations, 46 CFR § 250.1-250.6, setting out procedures for the agency's considering requests for participation of vessels built with the CDS in the carriage of Alaskan oil. Section 250.5 of these regulations repeats the statutory restriction that MarAd/MSB cannot approve "an application where the result would be to allow a vessel of the applicant to participate in the trade for a period exceeding six months in any consecutive 12-month period." The Seatrain-Polk request was made an official MarAd/MSB proceeding entitled Docket S-565.

26. Plaintiffs and other unsubsidized carriers filed timely comments opposing the Seatrain-Polk request.

27. On information and belief, after receiving comments in Docket S-565, MarAd/MSB held private exparte meeting(s) with representatives of Seatrain/Polk/Queensway discussing Seatrain-Polk's application. As a result of such discussion(s), Polk Tanker Corporation changed the terms of its request to the Maritime Administration. In a letter dated August 25, 1977, Polk proposed that it be released from the restrictions of its subsidy contract Ma/MSB-165, including the restriction against operation in the Alaska (domestic) trade, upon its execution of a twenty-year promissory note payable in 40 semi-annual installments for the amount of the construction differential subsidy and national defense fea-

tures paid for by the government under CDS Contract No. MA/MSB-164. Polk proposed various financing measures. This letter did not include any request for approval of a charter.

28. By separate letter dated August 26, 1977, Polk Tanker Corporation withdrew the application filed on July 8, 1977.

29. MarAd/MSB did not publish notice of the Polk Tanker Corporation application described in Polk's August 25, 1977 letter in the Federal Register, nor did the agency otherwise follow the procedures set forth in 46 CFR 250-1 *et seq.* Instead, on August 30, 1977 MarAd/MSB took a series of actions approving Polk's August 25, 1977 proposal.

30. These actions are described in two letters, each dated August 31, 1977, to Polk Tanker Corporation and Queensway Tankers, Inc. from Secretary James S. Dawson, Jr., attached as Exhibit B. One letter describes the actions taken by the Maritime Subsidy Board/Assistant Secretary of Commerce for Maritime Affairs with respect to (1) approving the so-called "subsidy repayment" which is not in fact a repayment of subsidy but merely the issuance of a promissory note to be paid over twenty years, and (2) amending the subsidy contract with Polk to release the vessel from restrictions. The second letter describes actions taken by the Assistant Secretary with respect to the Title XI debt financing guarantees.

31. Under the terms of the arrangement with Seatrain/Polk MarAd will get a first and second preferred mortgage on the SS STUYVESANT to secure the obligations guaranteed under Title XI of the Act. MarAd will get a third preferred mortgage on the SS STUYVESANT to secure the note promising subsidy repayments. This note is also secured by the charters for the SS STUYVESANT's operation in the Alaska trade.

MarAd is also getting a preferred security interest in the BAYRIDGE, another vessel under construction by Seatrain. MarAd/MSB's actions are summarized in a press release dated September 1, 1977 a copy of which is attached as Exhibit C. The press release explains that the agency is attempting to secure the use of the SS STUYVESANT in the Alaska trade in order to protect its own interests.

32. The net effect of the action taken by MarAd/MSB in accepting a promissory note in lieu of actual repayment of subsidy is to make an outright loan of the amount of the construction differential subsidy originally paid to Seatrain.

33. On information and belief, MarAd/MSB will be making similar arrangements to lift restrictions on the SS BAY RIDGE, another Seatrain-built vessel.

34. There was considerable ferment within the merchant marine industry after it learned of the aforesaid actions of MarAd/MSB, and a meeting of the Independent Tankers Owners Committee specifically to discuss these actions was scheduled for Thursday, September 8, 1977. At or before this meeting, communications were made by the Maritime Administrator to some or all of the persons attending the Independent Tanker Owners Committee that the decisions taken by MarAd/MSB in respect of the SS STUYVESANT, were for the good of the merchant marine industry and that, in consideration for a promise by some or all of the protestants in S-565 and/or other persons with similar interests not to appeal these decisions to a court and not to seek review of them by the Secretary of Commerce, the Maritime Administrator would agree to "shut the door" behind the SS STUYVESANT and the BAY RIDGE by enacting regulations designed for that purpose, such regulations to be drafted by the Independent Tankers Owners Committee. Counsel for the Independent Tankers Owners Committee did draft

such regulations and they were circulated to members of the aforementioned industry and/or their counsel on Monday, September 12, 1977. A copy of said regulations is attached hereto as Exhibit D. Upon information and belief, when Shell Oil Company filed its petition seeking a discretionary review by the Secretary of Commerce of the MarAd/MSB actions on September 12, 1977, the suggested "deal" became inoperative.

MarAd/MSB Actions are Unlawful

35. The actions taken by MarAd/MSB approving the Seatrain/Polk proposal are wholly unauthorized and beyond its powers in that the agency:

(a) lacks authority to release the vessel owner from the statutory restrictions of section 506 barring operation of a vessel built with CDS in domestic trades;

(b) lacks authority to accept the repayment of construction differential subsidy in full so as to "cleanse" the vessel of statutory restrictions governing vessels built with the subsidy;

(c) lacks authority to make a loan either for construction of a vessel or for repayment of construction differential subsidy. The actions are also unlawful in that they were taken in violation of the agency's regulations, 46 CFR Part 250, and contrary to standards of due process.

36. There are no provisions of the Merchant Marine Act, 1936 or any other statute which permit the agency to take these extraordinary actions and MarAd/MSB letters of August 31, 1977 fail to state any basis for the actions. In Docket S-565, Seatrain/Polk argued that Section 207 of the Merchant Marine Act, 1936 permitted the agency to lift restrictions against operating in the Alaska trade for a three-year period. But Section 207 is a housekeeping provision which merely authorizes the agency to

enter into contracts or make disbursements to protect, preserve or improve the government's collateral in the same manner as a private corporation and does not authorize the lifting of statutory restrictions against using CDS-built vessels in domestic trades or the making of loans to finance construction or subsidy repayment.

37. On information and belief, the agency may be relying, in whole or in part, on Section 1104(a) of the Merchant Marine Act, 1936 dealing with guarantees under Title XI. Section 1104(a) lists the permissible purposes of obligations which the agency may *guarantee.* One such purpose is "financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act. . . ." This section contains no authorization to make loans, or approve the permanent transfer of a CDS-built vessel to domestic trades, or to accept subsidy repayments. There are no statutory provisions of the Act permitting MarAd to make loans for building ships or repaying subsidy. The only provision of the Merchant Marine Act, 1936, or any statute, authorizing the agency to accept repayment of construction differential subsidy with the concomitant lifting of restrictions against operating in domestic trades is Section 506 which provides for lifting restrictions and partial pro rata repayment of subsidy in two carefully defined situations, i.e., (a) a temporary transfer of six months or less, or (b) incidental stops at domestic ports as part of a round-the-world voyage.

Agency's Actions Contradict Statutory Policies

38. Not only are the agency's actions statutorily unauthorized, but they are also contrary to the objectives of the construction subsidy program. The program is designed to promote the building of ships to be used in foreign commerce in U.S. shipyards. Since ships used in

domestic trades are required by law to be built in U.S. shipyards, there is no need for the government to pay subsidies. To permit a CDS built vessel to be used in either domestic trades or foreign trades (simply by repaying subsidies) discourages the building of unsubsidized vessels. The building of a ship without subsidy involves a much greater economic risk than building with subsidy where as much as 50% of the costs of construction are paid by MarAd. If it is possible to use a subsidized vessel in domestic trades, domestic operators will not wish to build unsubsidized ships.

39. The building of unsubsidized vessels for domestic trades, particularly the Alaskan tanker trade, is discouraged by the prospect that any perceived short-fall in the supply of unsubsidized vessels can be met by the use of vessels built with construction-differential subsidy. The ship building industry has experienced severe inflation. Since presently existing subsidized ships were built when construction costs and interest costs were lower than at present, the base cost of these subsidized vessels would be lower than the cost of new unsubsidized vessels, even if unamortized subsidy is repaid. Prospective purchasers of new vessels for domestic trades are reluctant to place orders for the construction of such vessels since they face the prospect of competing against CDS-built vessels which cost less even with subsidy to be repaid. Using a CDS-built ship is even more attractive if, as in the case of the SS STUYVESANT MarAd finances the subsidy repayment over a 20-year period.

40. The permanent transfer of even one or two CDS-built vessels has a spiraling effect. If domestic operators do not place orders for new unsubsidized ships fearing CDS competition, then there will be a future shortage of ships for use in the domestic trades. This future shortage will lead to the permanent transfer of additional CDS vessels to service the domestic trades which in turn

will further discourage the building of unsubsidized ships for the domestic trades with the result that only subsidized vessels are built in U.S. shipyards. This will place an unnecessary burden on the subsidy program and the U.S. taxpayer.

Unlawful Agency Action Harms Plaintiffs

41. Shipowners who have paid the full cost of U.S.-built tankers and have not received federal subsidy are subject to unfair and unlawful competition from the SS STUYVESANT, and from other CDS-built vessels with respect to which vessels the agency may likewise lift operating restrictions if this action is permitted to stand. Plaintiffs who made the economic decision to invest in ships built in U.S. shipyards without subsidy, relying on a market for the ships to be used in domestic trades, will forever be subject to competition from these vessels. Unsubsidized U.S.-built tankers cannot compete on an even footing with foreign-built and CDS-built tankers in foreign trades. They are at a disadvantage in competing in the domestic trade with CDS-built tankers owners—particularly if, as is in the case of the SS STUYVESANT, the government has made an outright loan of the amount of the subsidy and is permitting repayment over a 20-year period.

42. MarAd/MSB's action creates severe economic hardships disrupting the market for unsubsidized U.S.-built vessels. The fact that the SS STUYVESANT has been "cleansed" of subsidy and will operate permanently in the Alaska and other domestic trades, and that similar action will be taken to release the SS BAY RIDGE, raises uncertainty about whether, and under what circumstances, other CDS-built vessels will be cleansed and transferred to the domestic fleet. Since there are about as many CDS-built tankers as there are unsubsidized tankers, the prospect is that the domestic fleet could be

doubled. With the statutorily established guidelines overturned by MarAd/MSB actions to release the SS STUYVESANT, it is not possible to anticipate what will happen. Thus, the market cannot function. Oil companies which would purchase tanker space for the Alaskan oil trade will be unwilling to presently contract for existing tanker tonnage built without subsidy at rates which reflect the costs of building unsubsidized ships and the supply of unsubsidized ships anticipating that the supply of vessels available for use in domestic trades will increase as CDS-built vessels enter the market. (CDS-built vessels will be available at lower rates because they were constructed with subsidy.) This means that the unsubsidized owners and operators face difficulties in meeting financing obligations incurred to own and/or operate unsubsidized ships in domestic trades. It also means that plans to add additional vessels in domestic trades have become problematical—as has the financing for such vessels.

Relief Requested

WHEREFORE, Plaintiffs respectfully request that this court issue an order

(1) permanently enjoining the agency from taking any steps to carry out the actions set forth in two letters each dated August 31, 1977 from MarAd/MSB, to Polk Tanker Company and Queensway Tankers, Inc. and declaring all such actions null and void.

(2) declaring that the Secretary of Commerce, the Maritime Administration and the Maritime Subsidy Board lack authority to waive the restrictions of Section 506 of the Merchant Marine Act, 1936 so as to permit the operation of vessels built with construction differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year).

(3) permanently enjoining the Secretary of Commerce the Maritime Administration and the Maritime Subsidy Board from amending any construction-differential subsidy contracts or taking any other action to lift the restrictions of Section 506 of the Merchant Marine Act, 1936 permitting the operation of vessels built with construction-differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year);

(4) granting such other relief as the court may deem appropriate.

Respectfully submitted,

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Attorneys for
ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION

September 22, 1977

EXHIBIT A

ARTICLE 9. *DOCUMENTATION AND OPERATION OF THE VESSELS*

(a) The Vessel shall remain documented under the laws of the United States for not less than twenty (20) years from the date of delivery of each of the Vessels by the Contractor to the Purchaser or so long as there is outstanding a preferred ship mortgage from the Purchaser insured under Title XI of the Act, whichever is the longer period, subject however, to the provisions of section 611 of the Act.

(b) (i) Purchaser hereby agrees, in accordance with section 506 of the Act, that the Vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the West Coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic Coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the Vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the Vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Board that proportion of one-twentieth of the construction-differential subsidy paid for such Vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year; and (ii) Purchaser agrees to comply in all other respects with Section 506 of the Act.

(c) The Purchaser agrees that for the twenty-year economic life of the Vessel that the Vessel shall be operated in the foreign commerce of the United States pursuant to Section 905(a) of the Act and the regulations issued thereunder consistent with such section.

(d) The foregoing provisions of this Article shall run with the title to the Vessel and be binding on all Owners thereof.

ARTICLE 10. *NATIONAL DEFENSE FEATURES*

(a) The Purchaser agrees that, for the purposes of paragraphs (b) and (c) below, the foreign cost of the National Defense Features incorporated into the Vessel shall be as follows

(1) Feature	(2) Cost of Feature	(3) Foreign Cost of Feature
Fueling at Sea	$70,000	$41,349
Highline Transfer	4,000	2,363
Prohibition of Gray Cast Iron	77,000	45,484

provided that in the event the cost of National Defense Features is increased or decreased by reason of a change or changes, the foreign cost of National Defense Features will be adjusted accordingly.

[SEAL]

EXHIBIT B-1

UNITED STATES DEPARTMENT OF COMMERCE

Maritime Administration
Washington, D.C. 20230

August 31, 1977

Polk Tanker Corporation
One Chase Manhattan Plaza
New York, New York 10005

Gentlemen:

For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states. The Economic Development Agency in June 1975 agreed to guarantee additional funding to Seatrain Shipbuilding Corporation to reopen its yard to complete this vessel taking into account the same possibility. In light of the fact that several years of work and negotiations have generated no other opportunities for employment of this vessel, and being persuaded that approval of the proposed CDS repayment and the time charter of the Sohio Petroleum Company will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation, the Maritime Subsidy Board (Board)/Assistant Secretary of Commerce for Maritime Affairs (Assistant Secretary) with respect to the requests dated July 12, 1977 and August 25, 1977, from Polk Tanker Corporation (Polk) pertaining to the T. T. STUYVESANT, took the following actions on August 30, 1977:

I. By the Assistant Secretary:

A. Approved, pursuant to sections 9, 37 and 41 of the Shipping Act, 1916, as amended (the Shipping Act), the time charter by United States Trust Company of New York, as owner trustee, and Queensway Tankers, Inc., as charter owner, of the tanker Builder's Hull No. 102 (to be documented under U.S. flag and named STUYVESANT), to Sohio Petroleum Company, a Delaware corporation but not a citizen of the United States within the meaning of section 2 of the Shipping Act, for a period of three (3) years commencing on or about the date of Maritime Administration approval, for the carriage of crude oil and/or dirty petroleum products in permissible worldwide trade, upon the conditions: (1) that without the prior written approval of the Maritime Administration the vessel shall not be subchartered to aliens, except as may be permitted by General Order 59, 2d Revision, as amended; and (2) that the operating range of said vessel shall not include the Soviet Union, Latvia, Lithuania, Estonia, Czechoslovakia, Hungary, Bulgaria, Albania, North Korea, the Soviet Zone of Germany, Manchuria, the People's Republic of China, Cambodia, North Vietnam, South Vietnam, Cuba or Southern Rhodesia, unless otherwise permitted by regulations of the Department of Commerce.

II. By the Board:

A. Found, pursuant to section 501(a) of the Merchant Marine Act, 1936, as amended (the Act), that United States Trust Company, as owner trustee and Queensway Tankers, Inc., as charter owner, are acceptable transferees of the T. T. STUYVESANT, subject to both companies demonstrating their U.S. citizenship, under section 2 of the Shipping Act, to the satisfaction of the General Counsel.

B. Approved, pursuant to Article 14 of Board Contract No. MA/MSB-165, the assignment of the T. T. STUYVESANT to United States Trust Company as owner trustee and the bareboat charter of the vessel to Queensway Tankers, Inc.

C. Authorized the repayment to the United States on the date of delivery of the T. T. STUYVESANT, of the total amount of construction-differential subsidy paid in connection with the construction of the vessel, including the cost of National Defense Features, as determined by the Maritime Administration, in the form of a promissory note issued by Polk and to be assumed by the United States Trust Company as trustee upon purchase of the vessel, payable in level installments of principal and interest, semi-annually in arrears for twenty years beginning on the date of delivery of the vessel, provided that:

(1) The note is secured by a preferred ship mortgage on the vessel to be given by the owner trustee in favor of the United States which will be subject and subordinate to a first preferred mortgage and second preferred mortgage to be given by the owner trustee to secure obligations insured and/or guaranteed under Title XI of the Act, in connection with financing the vessel.

(2) The note is also secured by the owner trustee's interest in (a) the bareboat charter; (b) the time charter; and (c) the Seatrain Security Agreement.

(3) All documents related to the repayment of CDS have been found to be satisfactory, in form and substance, to the Office of the General Counsel.

D. Determined that interest is payable on the promissory note authorized in paragraph C above, with

interest theron to be at the same rate borne by the second tier of Title XI debt from date of execution.

E. Authorized the amendment of Board Contract No. MA/MSB-165 to release the vessel owner from all restrictions, obligations and duties contained therein, except those contained in Articles 4 and 11 pertaining to the right of the Board to the engineering and design data for the vessel, and the purchase and requisition rights of the United States to the vessel pursuant to section 802 of the Act, respectively. It shall be understood that with respect to the compensation formula contained in Article 11, the amounts of CDS repaid pursuant to paragraph C above, shall be considered in the calculation of compensation.

F. Authorized the Assistant Secretary of Commerce for Maritime Affairs (the Secretary), on behalf of the Board, to accept or enter into the following documents:

1. Promissory Note from Polk;

2. Novation Agreement among United States Trust Company as owner trustee, Polk and the Secretary;

3. Security Agreement between United States Trust Company as owner trustee and the Secretary; and

4. Preferred Ship Mortgage (Third) between United States Trust Company as owner trustee and the Secretary

in substantially the form submitted, proof date August 25, 1977, or with such changes as the Secretary shall approve and delegated to the Assistant Administrator for Maritime Aids authority to take all

actions necessary in connection with the administration of the above mentioned documents.

Your attention is invited to the provisions of Department of Commerce Organization Order 10-8, section 7, and we ask that you indicate your acceptance of the above actions by signing, dating, and returning the enclosed copy of this letter.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

Enclosure

[SEAL]

EXHIBIT B-2

UNITED STATES DEPARTMENT OF COMMERCE

Maritime Administration
Washington, D.C. 20230

August 31, 1977

Polk Tanker Company
One Chase Manhattan Plaza
New York, New York 10005

Queensway Tankers, Inc.
110 Wall Street
New York, New York 10005

Gentlemen:

With respect to the proposed sale of the STUYVESANT (Vessel) by Polk Tanker Corporation (Polk) to The United States Trust Company of New York (Shipowner), not in its individual capacity but solely as owner trustee under a Trust Agreement between it and General Electric Credit Corporation (GECC), and the proposed additional bond sale, you are advised that on August 30, 1977, the Assistant Secretary for Maritime Affairs (Secretary) took the following actions:

I. Approved the Shipowner, not in its individual capacity but solely as owner trustee under a Trust Agreement between it and GECC, as lessor under the lease financing arrangement.

II. Found that Cove Shipping, Inc. (Cove) possesses the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

III. Approved Queensway Tankers, Inc. (Queensway) as bareboat charterer and, found pursuant to Section 1104 (b) (1) of the Merchant Marine Act, 1936, as amended (Act), subject to compliance with the requirements herein

stated, and the execution of the Management Agreement required below, that Queensway and the Shipowner possess the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

IV. Approved the proposed sale and lease financing arrangement, whereby Polk will assign its rights and obligations under the construction contract for the Vessel to the Shipowner, pursuant to Section 8.01 of the Trust Indenture.

V. Required that the lease terms of the sale and lease proposal be subject to approval by the Maritime Administration including, but not limited to, the lease rate, indemnification, etc.

VI. Found under Section 1104(d) of the Act that the property or project with respect to which the additional guaranteed obligations will be issued remains, in his opinion, economically sound.

VII. Determined, pursuant to Sections 1101(f) and 1104 (b)(2) of the Act, that the final actual cost of construction of the Vessel is as follows:

Construction Costs	$70,180,428
Net Interest	5,372,679
Total Actual Cost	$75,553,107

On this basis fixed the guarantee amount of $60,200,000, which amount does not exceed 87½% of the actual cost of the Vessel.

VIII. Found that on the basis of the repayment of construction-differential subsidy (CDS) the Vessel is eligible for a guarantee in an amount not to exceed 87½% of the actual cost of construction of the Vessel.

IX. Approved the amortization of the proposed additional obligations ($31,355,000) on a twenty year level debt service basis (equal payments of principal and interest).

X. Required Queensway to execute a Management Agreement with Cove and required that said Management Agreement be approved in form and substance by the Secretary.

XI. Required that at or prior to the guarantee closing the Economic Development Administration (EDA) subordinate its preferred position on the BAY RIDGE, presently being constructed at Seatrain, in favor of the Maritime Administration.

XII. Required that Chase Manhattan Bank, N.A., (Chase) agree to subordinate their position on the BAY RIDGE to the Maritime Administration and to EDA up to $40,000,000 even should the Letters of Credit issued by Chase for use with respect to the BAY RIDGE be drawn down.

XIII. Required that Queensway execute a Title XI Reserve Fund and Financial Agreement (Financial Agreement) in the form of our standard Financial Agreement dated December 1, 1974.

XIV. Required that Queensway deposit 100% of its profits into the Reserve Fund until it has accumulated an amount in the Reserve Fund and Seatrain Security Fund equal to 50% of the outstanding principal balance of the First and Second Mortgage.

XV. Required that for purposes of Section 12 (negative covenants) of the Financial Agreement the working capital and net worth requirements be set at $11,027,700 for both.

XVI. Required that at or prior to the guarantee closing, the Shipowner have funds available equal to the difference between the outstanding indebtedness on the Vessel and the capitalizable cost of the Vessel (approximately $32.7 million).

XVII. Required that at the guarantee closing Queensway have working capital sufficient to supply the Vessel on its

initial voyage, obtain the necessary marine insurance, and pay the Title XI guarantee and insurance fees and that an officer of Queensway certify that Queensway has this amount.

XVIII. Required that for purposes of meeting the working capital requirement of Section 12 of the Financial Agreement, 50% of the amounts in the Reserve Fund will be counted towards working capital so long as the 100% deposit of profits requirement is in effect.

XIX. Required that Seatrain establish a Seatrain Security Fund and deposit into this fund from the escrowed equity investment of GECC plus its earnings any amounts in excess of those required to protect GECC.

XX. Determined that Seatrain will not have to make deposits into the Seatrain Security Fund if the amount on deposit in the Security Fund plus the amount in the Reserve Fund equals 50% of the outstanding indebtedness (relating to the First, Second, and Third Mortgages) related to the Vessel.

XXI. Considered the release of the Seatrain Security Fund to Seatrain if any of the following conditions are met:

(A) If Queensway should secure a time charter or contract of affreightment to an acceptable credit risk, as determined by the Secretary, equal to at least 1/2 of the remaining original term of the bareboat charter wherein (1) the charter hire is sufficient to service the bareboat charter hire and is paid on a hell-and-highwater basis, (2) the operating component of the charter hire is sufficient for all operating expenses, and (3) there is a reasonable profit to Queensway.

(B) If Queensway should secure a time charter or contract of affreightment meeting all the conditions in (A) above except that it was not for 1/2 of the remaining

original term of the bareboat charter, and if this time charter or contract affreightment plus the amount in Queensway's Reserve Fund assured the payout of at least 50% of the outstanding indebtedness of the Vessel at the end of the charter period.

(C) If the Vessel is sold to a buyer possessing acceptable substantial credit as determined by the Secretary.

(D) If Queensway were to merge into a company that has sufficient assets and credit, as determined by the Secretary, to service the bareboat charter hire.

(E) The presence of any other conditions or circumstances as determined by the Secretary which would give the Maritime Administration security in an amount at least equal to any of the four above stated conditions.

XXII. Required Queensway to (1) establish United States citizenship in form and manner prescribed in 46 CFR 355 within 30 days after date of this Commitment or this Commitment may be terminated by the Secretary at his sole discretion; provided, however, if a Commitment to Guarantee Obligation closing is scheduled to occur within said 30 day period, required such parties to establish United States citizenship at least 15 days prior to the Commitment to Guarantee Obligation closing and (2) submit satisfactory evidence of continuing United States citizenship on the date of Commitment to Guarantee Obligation closing, at all Guarantee closings and all Mortgage closings with pro forma evidence of citizenship to be submitted at least 10 days prior to the appropriate Commitment, Guarantee and/or Mortgage closing.

XXIII. Required the Shipowner, Polk, Cove, and GECC to submit satisfactory evidence of continuing United States citizenship at the guarantee closing.

XXIV. Required satisfactory evidence of Vessel insurance at least 10 days prior to the guarantee closing.

XXV. Required that any services performed by or for Queensway by or for an affiliated company be at a fair

and reasonable rate or approved by the Secretary as to fairness and reasonableness.

XXVI. Required that at least 5 days prior to the guarantee closing Queensway submit to the Secretary a financial statement certified by an officer of the company indicating all non-Title XI debt then in existence.

XXVII. Fixed the additional investigation fee authorized by Section 1104(f) of the Act at $39,193.75, less the $3,000 amendment fee previously paid, which amount must be paid within 30 days of the date of this action but in any event prior to the guarantee closing.

XXVIII. Required that the guarantee fee under the Second Mortgage and the insurance fee under the First Mortgage be fixed at 3/4% until reduced by the Secretary based upon Queensway having secured a charter justifying the reduction.

XXIX. Authorized the Assistant Administrator for Maritime Aids to approve all appropriate documents and to take such other actions as may be necessary to effectuate the purposes of this action.

XXX. Required that all documentation be in form and substance satisfactory to the Secretary.

XXXI. Authorized the execution of this letter to Polk and Queensway which will constitute a Letter Commitment to Guarantee Obligations with respect to the sale of the Vessel and additional Title XI obligations, subject to the conditions contained herein, and required Polk and Queensway to accept the provisions hereof by signing and returning a copy to the Secretary.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

EXHIBIT C

U.S. DEPARTMENT OF COMMERCE

Maritime Administration

September 1, 1977
Page 1 of 3

B77-506

The Assistant Secretary and the Maritime Subsidy Board have taken several actions to permit the use of the SS STUYVESANT, a 225,000-dwt tanker built with construction-differential subsidy, in permissible worldwide trade.

The actions clear the way for the tanker's owners to charter it to Sohio Petroleum Company for a 3-year period for the Alaskan oil trade. The Maritime Administration has for 2 years been considering the possibility that upon delivery there might be no market for the STUYVESANT other than the Alaskan oil trade. Several years of negotiations have generated no other employment opportunities for the vessel. In June 1975 the Economic Development Administration guaranteed loans in the amount of $77 million to permit Seatrain Shipbuilding Corporation, N.Y., N.Y., to reopen its yard to complete the STUYVESANT.

Approval of the proposal by the ship's owners, Polk Tanker Corporation, to repay the entire amount of CDS and to time charter the vessel to the Sohio subsidiary will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce. Failure to do so would jeopardize the continued operation of Seatrain Shipbuilding Corporation. In light of these considerations, the Board and the Assistant Secretary took the following actions on August 30, 1977.

The Board approved the transfer of ownership from Polk to United States Trust Company, which will bareboat charter it to Queensway Tankers, Inc., which will then time charter it to Sohio Petroleum. Polk will issue a promissory note—which U.S. Trust will assume—payable to the United States Government in the amount of $27.2 million. The note represents the aggregate amount of CDS and the cost of National Defense Features paid by the U.S. to Seatrain. The note will be payable for 20 years in 40 level semi-annual installments of principal and interests. The note will be secured by a third preferred ship mortgage, subordinate to the first and second preferred mortgages to be given by U.S. Trust to insure Title XI obligations issued to finance the vessel. The note will also be secured by U.S. Trust's interest in the bareboat charter and the Seatrain Security Agreement. Interest on the promissory note will be at the same rate as the second tier of Title XI debt.

The vessel may not be subchartered to aliens without prior written permission from MarAd, and it may not trade in specified Communist countries or in Southern Rhodesia.

The CDS contract will be amended to release the vessel from all restrictions, obligations, and duties, except those concerning the right of the Board to the engineering and design data for the vessel and the Board's purchase and requisition rights.

The STUYVESANT is one of three 225,000-dwt tankers which Seatrain has built with CDS. Polk, a Seatrain affiliate, applied on July 12, 1977, for approval of the 3-year charter and prorated CDS payback. It later withdrew that application and requested permission to repay the entire amount of CDS and to release the vessel from its CDS contract restrictions.

EXHIBIT D

The Maritime Administration has recently approved an application by the owner of a vessel built with construction-differential subsidy under Title V, Merchant Marine Act, 1936, as amended, to repay such subsidy in order to remove the vessel's statutory disability to engage in coastwise service.

On September 12, 1977, the American Maritime Association and the Independent Tanker Owners Committee filed a petition for issuance of a rule setting forth the principles on which the aforesaid action was based and prescribing their future applicability. The Maritime Administration hereby grants the petition and, subject to due consideration of comments that may be submitted, is disposed to adopt an appropriate rule in the terms appearing below.

The considerations supporting the rule are two-fold:

First. Construction-differential subsidy is awarded under Title V when the particular vessel is found to be needed to meet the requirements of, and to aid in promoting, the foreign commerce of the United States. The applicant will have warranted that he is, and will have been found, qualified in respect of ability, experience and financial resources necessary for the operation; and where Title XI is involved, as is usual, the operation will have been warranted and determined to be economically sound. These judgments contemplate cyclical market downturns, which even when severe would not ordinarily be deemed to create conditions negating such findings and determinations. Subsidized operations would therefore be expected to maintain their status in foreign trade pending cyclical improvements, especially (but not exclusively) where the vessel is under term charter to substantial charterers. To allow repayment of subsidy in other than limited and exceptional circumstances would dero-

gate from the purposes and policy of the act respecting our services in foreign trade, since once deprived of the subsidy, the vessel would obviously not be able to compete against foreign operators again.

Second. It would further derogate from the purposes and policy of the act to allow significant transfers from subsidized foreign trade into the domestic trade outside the limited and temporary ambit of Section 506. Such transfers would not merely reduce available shipping for foreign trade, but would have the effect of displacing existing tonnage or eliminating to that extent opportunities for new construction in domestic trade. Our recent rule applying Section 506 to the Alaska trade illustrates our general approach in this regard: Subsidized tonnage may be used for not to exceed six months upon a finding of real need in the trade, and will in any case give way to unsubsidized tonnage with coastwise privileges as it is delivered from shipyards or otherwise becomes available. Widespread permanent transfer would negate this policy.

These dual elements of the coherent national policy for procuring an adequate fleet respectively for foreign and domestic commerce require that as a general rule vessels properly awarded construction-differential subsidy shall be held to their contractual agreements to operate exclusively in the foreign trade, and that transfers to domestic trade shall be limited in accordance with Section 506.

From this general principle the Maritime Administration will in exceptional individual cases consider a departure where certain combinations of circumstances are found to exist, including at least the following:

1. No other opportunities for employment in foreign trade can be generated for the vessel during a protracted period that demonstrably exceeds normal cyclical exceptions;

2. Specifically because of the vessel's unemployment, the holder of title (as distinguished from a lessee or charterer), whose primary business must be the construction or operation of ships (as distinguished from financing such construction or operation), is threatened with corporate bankruptcy, which cannot be ameliorated by other financial concessions or means;

3. The government will sustain substantial financial loss through such bankruptcy; and

4. Agreement to accept repayment of subsidy will, on balance, result in greater benefit than detriment to the purposes and policy of the act. In measuring this balance, opportunity on ten-days' notice to be heard in writing will be granted to affected interests in the domestic trade and in the shipbuilding industry.

[As at present advised, the Maritime Administration has reason to believe that only one additional vessel, the BAY RIDGE, would present a case for qualifying under this rule. However, market conditions may substantially alter before delivery of this vessel.]

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN J. ERVIN

John J. Ervin hereby certifies that:

1. He is a United States citizen, age 49, residing at 5838 North 4th Street, Philadelphia, Pennsylvania 19120;

2. He is President of Trinidad Corporation, a Delaware corporation ("Trinidad"); and

3. The following statement concerning Trinidad is true and correct to the best of his knowledge, information and belief:

Trinidad, a wholly-owned subsidiary of Barber Oil Corporation, was formed in 1944 to operate and manage a fleet of U.S. flag tankers under long and short term charters to major oil companies. Trinidad presently conducts its business from offices in the Public Ledger Building in Philadelphia, Pa. and has approximately 37 employees. Trinidad's assets are in excess of $23,000,000 and the Shareholder's Equity is approximately $11,600,000.

Trinidad is the owner of five 27,000 DWT U.S. Flag tankers, four of which are operating under transportation contracts with a major oil company. The fifth tanker is under charter to the Military Sealift Command of the U.S. Department of the Navy.

In 1976 Trinidad purchased all the capital stock of Mathiasen's Tanker Industries, Inc. ("Mathiasen's"). Mathiasen's has on long term bareboat charter three 80,000 DWT U.S. Flag tankers. Two of these vessels are under time charter for terms equal to their corresponding bareboat charter. The third vessel has been sub-bareboat chartered to an affiliate of Trinidad, Glacier Bay Transportation Corporation ("GBC") for a term coinciding with the term of the bareboat charter to Mathiasen's. GBC in turn has sub-bareboat chartered the third vessel to ABC for a term of three years.

None of the eight U.S. Flag tankers mentioned above is the beneficiary of a construction-differential subsidy. Each must compete on its own in the domestic or foreign trade upon expiration of the charter or transportation contract to which it is presently subject.

In April, 1976, Barber announced its intention to become a major carrier of Alaskan crude oil through its subsidiary, Trinidad. The plan was to be implemented through the acquisition by Trinidad of Mathiasen's as above indicated and the acquisition of an interest in Alaska Bulk Carriers, Inc. ("ABC"), which holds a contract of affreightment with The Standard Oil Company (Ohio), ("Sohio"), contemplating the annual transport by ABC of up to 51 million barrels of crude oil from Alaska to California and the two acquisitions placed Trinidad in a position to participate as a major factor in this transport. The acquisitions represent a combined Barber and Trinidad commitment in excess of $9,000,000.

Subsequent to the two acquisitions, Trinidad entered into a multi-million dollar bank loan agreement to finance its cash requirements during the term of the contract of affreightment with Sohio.

Trinidad's acquisition of Mathiasen's and Trinidad's acquisition of an interest in ABC and the internal and external financial commitments of Trinidad relevant thereto were all undertaken in reliance on projections which assumed that U.S. Flag tankers which are the beneficiaries of construction-differential subsidies would continue to be barred by statute from the Alaska crude oil trade in particular and the U.S. coastal trade in general.

It is fair to say that if Barber and Trinidad had known in early 1976 that any tonnage then barred from participation in these trades would subsequently, by administrative fiat, be permitted to operate therein, the acquisitions may very well never have been consummated or, if consummated, would have been on terms far more favorable to Trinidad than those in effect at the present time.

More specifically, during the period from June, 1979 through August, 1980, Trinidad may have to find employment for a total of 215,000 DWT of U.S. Flag tankers in the open market. As a practical matter, the U.S. coastal trade is the only viable market. It is a matter of public record that the U.S. Flag tankers qualified to operate in the U.S. coastal trade have an aggregate dead weight tonnage of approximately 9,500,00. Similarly, U.S. Flag tankers in existence or under construction which enjoy or will enjoy construction-differential subsidy and are, therefore, precluded from that trade, have an aggregate dead weight tonnage of approximately 5,000,000. Obviously, any projections which Trinidad has made in the past or may make in the future with respect to the deadweight tonnage available in U.S. coastal trade during the period from June, 1979 through August, 1980 will be greatly distorted if the T. T. STUYVESANT (22,5000 DWT) or the TT. BAY RIDGE (225,000 DWT) or other vessels within the 5,000,000 tonnage category, suddenly become available to compete, long term, in the coastal trade which now has a maximum available dead weight tonnage of 9,500,000. The U.S. coastal charter market has already softened to reflect this possibility but presumably would regain stability if the removal of the statutory disability to enageg in coastwise service was the subject of a judicial restraining order.

The impact on Trinidad of the removal of the statutory disability as to a significant amount of tonnage

(and 225,000 dead weight tons is significant) ranges from materially adverse at best to disastrous at worst. Moreover, if the Maritime Administration action which is the subject of the litigation captioned as above is not restrained, the adverse financial impact on the assets and operations of Trinidad and other companies similarly situated will be irreparable in that the permanent long term financing for the construction costs of the T. T. STUYVESANT will have been accomplished by the public sale of millions of dollars of government-insured bonds, the proceeds of which will have been distributed to construction lenders, contractors and other parties without possibility of recall or recision.

/s/ John J. Ervin
JOHN J. ERVIN

Sworn to and subscribed before me this 21st day of September, 1977.

/s/ Dorothy D. Barbuscia
DOROTHY D. BARBUSCIA

Notary Public, Philadelphia, Philadelphia Co.

My Commission Expires March 13, 1980.

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF LARRY F. LIDDLE

I am Larry F. Liddle, Secretary of Alaska Bulk Carriers, Inc. (ABC).

1. Alaska Bulk Carriers, Inc. is a Pennsylvania corporation. Its address is Foot of Morton Avenue, Chester, pennsylvania 19013.

2. Alaska Bulk Carriers charters and employs three unsubsidized U.S. tankers. Each of these vessels was built without construction subsidy. The three ships are the PRINCE WILLIAM SOUND, of 124,000 deadweight tons (DWT), the GLACIER BAY (formerly JOSEPH D. POTTS), of 80,000 DWT, and the AQUILA (formerly NOTRE DAME VICTORY), of 80,000 DWT.

3. All three ships were designed and built by Sun Shipbuilding and Dry Dock Company. The ships, by design, are suited to the carriage of oil from Alaska to the U.S. west coast or to transshipment facilities on the west coast of Panama. The decision to build these ships was made by management, relying on their use in the Alaska trade to carry oil. They are too large for transit through the Panama Canal and for use in any other domestic trade. Because of the statutory restrictions imposed by law on ships built with construction differential subsidy, the ships were built without benefit of subsidy.

4. All three ships are used by ABC to fulfill a contract with Standard Oil of Ohio (SOHIO) to carry oil from the Trans-Alaska Pipeline. The contract has a term of

three years, ending in 1980. After 1980, the PRINCE WILLIAM and the GLACIER BAY will not be employed unless a new domestic charter is made for these vessels.

5. Decisions are made with respect to the building and chartering of U.S. ships based on the restrictions in the Merchant Marine Acts which (1) permit only U.S.-built and registered ships to operate in the domestic trades including the trades from Alaska to the mainland, and (2) prohibit ships built with construction differential subsidy (CDS) from operating in the domestic trades. Until now, the decision to build or to undertake financial commitments with respect to unsubsidized vessels were based on assessments of the capacity of the already existing unsubsidized fleet, and the prospects for these vessels' employment in the domestic trades. An undertaking to build an unsubsidized ship means that the owner must assume the financial risk of the full cost of a ship, whereas an undertaking to build a subsidized ship involves much less financial risk.

6. In the late 1960's and again in the 1970's, the prospect of increased need for large tankers to carry Alaska oil to the U.S. mainland encouraged the investment of private capital resources or credit lines for tanker construction without CDS subsidy. Each owner evaluated the anticipated volume of Alaskan oil, the likely destinations, and the other ships in the market which likely would be competing to transport the oil. Ships which were built in U.S. shipyards with subsidy were built knowing that they could only be used in foreign trades.

7. The established ground rules have been that vessels built with CDS are not able to operate in domestic trades and the domestic trades were reserved for U.S.-built ships. The economic decisions of the industry have been based on these rules.

8. Unsubsidized vessels cannot compete on an even footing with subsidized vessels. The costs of materials

and labor involved in ship construction have been steadily accelerating for many years. The table below gives Bureau of Labor Statistics indexes which measure inflation in the major components of ship prices.

INCREASED SHIPBUILDING COSTS

	Costs of Labor Dollars/Hour			Material Cost Index (base 1967)			
1973	July	$4.58	100%	1973	July	132.8	100%
1974	July	4.94		1974	July	180.3	
1975	July	5.50	120%	1975	July	183.4	138%
1976	July	6.00		1976	July	198.7	
1977	July	6.40	140%	1977	July	210.3	158%
Bur. of Labor Stat.—Class 3731 Shipbuilding and Ship Rep. (Labor) Hourly Index				Bur. of Labor Stat—Code 10 Mater. Esc. Factor (Metal and Metal Prod.)			

In only four years, labor costs rose 40% and material costs rose 58%. Thus, a subsidized ship built four years ago is available at a base cost 50% below that of an unsubsidized ship now being delivered—even if unamortized subsidy is repaid. Of course, if the subsidy is not repaid but the owner of the subsidized vessel merely promises to repay the subsidy over twenty years the base cost is even lower. These lower base costs mean that if a subsidized vessel could be "cleansed" (i.e., permitted to repay CDS and operate without restriction in domestic trades) it could be offered at a significantly lower charter rate than an unsubsidized vessel and recover the same rate of return.

9. IF CDS vessels were available for use in the domestic trades, the maritime industry will not be willing to make financial commitments for new vessels without construction subsidy. CDS permits the maximum flexibility for the investment. With CDS, a ship could operate in foreign commerce. In bad times, it could be "cleansed"

and enter the domestic market. The result would be heavy and unnecessary pressure on the subsidy program.

10. Therefore if CDS-built vessels were available for use in the domestic trades, new ships would not be built without construction subsidy. This in turn, results in increased future pressures for "cleansings." If new unsubsidized vessels are not built, there will be a future shortage of ships for use in the domestic trades which will lead to further "cleansings."

11. The action of the Maritime Administration permitting the repayment of construction differential subsidy and lifting restrictions on operation in domestic trades with respect to the SS STUYVESANT has created uncertainty within the industry. No one knows whether, and under what circumstances other CDS built vessels may be cleansed and made available for use in the domestic trade. The existence of this uncertainty seriously hurts the industry. It is of the utmost importance to the industry that there be a settled rule governing the competitive position of subsidized and unsubsidized vessels. Shipsowners are accustomed to dealing with various types of uncertainty and risk. Risks and uncertainties created by ad hoc government decisions, without any known guidelines, create disruption in the marketplace. The uncertainty engendered by MarAd's action "cleansing" the SS STUYVESANT is highly disruptive both to the shipbuilding and domestic charter markets.

12. The serious disruption and damage that is caused by the "cleansing" of the SS STUYVESANT (and the projected cleansing of its sister ship, the SS BAY RIDGE) from the restrictions governing operation of a vessel built with construction differential subsidy can more easily be understood when one considers that recently 29 unsubsidized U.S. tankers suitable for the Alaska trade (*i.e.*, domestic unsubsidized tankers too large to transit the Panama Canal) have been built or ordered. The cleansing

of the SS STUYVESANT and the SS BAY RIDGE will increase the supply of large tankers "authorized" for domestic trade but unable to transit the Panama Canal by thirteen percent.

13. The serious impact of this uncertainty upon the Maritime industry is reflected in the objections registered by the Shipbuilders Council of America to the action taken by MarAd with respect to the SS STUYVESANT. These are set forth in a letter dated September 20, 1977, which I have attached. This letter in markedly strong tones expresses "unanimous concern" about the "implications of this decision as affecting (1) a precedent whereby others may be tempted to seek the same deviation from long-standing policy, (2) the statutory obligation of the Congress to continue to provide CDS funds, (3) the prospects of new building opportunities for Jones Act ships, (4) the current or prospective availability of Jones Act vessels built specifically for domestic trade operations, and (5) the inherent movement toward putting the Federal Government in the questionable role of banker in refinancing, over a long term, at probably less than commercial rates of interest, a straitened project which had been initially supported by public funds and guaranteed by the full faith and credit of the public treasury."

14. Because the MarAd action with respect to the SS STUYVESANT caused an uproar in the industry, a meeting of the Independent Tanker Owners Committee was called for Thursday, September 8, specifically to discuss this action. At that meeting, it was learned that the Maritime Administrator had assured some of the Committee members that MarAd would issue regulations designed to bar future "cleansings" if the industry would agree not to appeal the SS STUYVESANT decisions to the Secretary of Commerce and especially to a court. Counsel for the Independent Tanker Owners Committee

was invited to and did draft regulations for that purpose and they were circulated to many industry members or representatives. I believe that when Shell Oil Company asked for a discretionary review by the Secretary of Commerce, the proposal was dropped by MarAd, although talk of regulations designed to "shut the door" behind the STUYVESANT and possibly the BAY RIDGE (I understand MarAd would not commit itself to foreclose the possibility of "cleansing" the BAY RIDGE) still continues.

15. MarAd's actions permitting the SS STUYVESANT to repay CDS and to permanently operate without restriction in the domestic trade (and its probable intention to take similar actions for the SS BAY RIDGE) cause serious, immediate and irreparable harm to ABC. In the first place, ABC is damaged in terms of its ability to go out into the charter market now and secure future charters for its three vessels which have no employment past 1980. The uncertainty engendered by MarAd's actions has disrupted the charter market. Not only has great tonnage been added by fiat, with the "cleansing" of the SS STUYVESANT, but prospective charterers are taking a "wait and see" attitude, waiting to see if the SS BAY RIDGE and other CDS vessels are made available.

16. Long-term financing is still needed for the Prince William. (ABC is committed to a charter for the Prince William for at least 20 years.) We are presently in the market seeking this financing, but our ability to secure bank financing now is seriously weakened by the prospect of competition of CDS-built vessels. Investors rely on the future prospect of employment for the vessel, looking at the demand for the type of vessel and the expected supply. But the uncertainties created by MarAd's action and the competition of the SS STUYVESANT and the SS BAY RIDGE upset the equation upon which ABC relied in undertaking its charter commitments and seriously impair its position with investors.

17. If the SS STUYVESANT and SS BAY RIDGE are permitted to repay CDS and permanently operate without restriction in the domestic trade, these ships will be direct, lifelong competitors of the three ABC ships and other tankers built for the Alaska oil trade. The only domestic trade for which the SS STUYVESANT and SS BAY RIDGE are suitable is the carriage of oil from Alaska to the U.S. west coast. Their size precludes them from other domestic markets. (The other major domestic market involves the movement of petroleum products from the U.S. Gulf Coast to the U.S. east coast. The terminals in this market cannot handle ships which are larger than 35,000 DWT.)

18. This is unfair competition. In undertaking the responsibilities of ownership or primary financial responsibility (such as that of a long-term bareboat charterer) for a CDS-built ship, Seatrain/Polk made a conscious election to limit trading opportunities to foreign commerce. The U.S. government paid up to half of the costs of the ship in order to have the ship participate in foreign commerce in the national interest. For ABC, committing to charter a U.S. ship built without subsidy was a conscious election to operate in the domestic trade. Because of the higher costs of building the ship, only rarely can it participate in the foreign market. In forgoing the CDS, a far greater risk is assumed.

19. Government-insured financing and CDS aid for the SS STUYVESANT was committed as early as 1972. From that time until the MarAd actions which are the subject of the pending motion, the domestic tanker industry made numerous serious financial decisions and commitments based on market and capacity projections which did not include Seatrain's vessels (STUYVESANT and BAY RIDGE) which were contractually excluded from domestic trade.

20. If the unsubsidized operator must see his investment through good times and bad, the subsidized operator should have no more favorable treatment. Yet in the case of the SS STUYVESANT, the unsubsidized U.S. Merchant Marine and U.S. taxpayers must bear the burden of saving a subsidized shipbuilder from the economic consequences of an unsuccessful and unwise decision.

21. The "cleansings" permit owners and operators of "CDS" ships to cash in on an increase in the value of subsidized ships, resulting from inflation, at the expense of unsubsidized shipowners and operators who took greater risks in forgoing federal aid. But even if the costs of a "cleansed" subsidized ship were the same as that of its unsubsidized competitor, it would still be unfair to change the ground rules and to subject unsubsidized ships to the competition of subsidized ships when the unsubsidized fleet took the economic risks.

22. Emergency injunctive relief is essential to remove the uncertainty introduced by MarAd's action and to prevent the unsubsidized fleet from the permanent unfair and illegal competition of the SS STUYVESANT, and probably the SS BAY RIDGE. The issuance of an emergency injunction will be a signal to the industry that MarAd will not be permitted to make up the rules as it goes along, with no laws or guidelines applicable to all. This will counter the disruptive effect of MarAd's action on the charter and shipbuilding markets and on the economic position of the owners and operators of unsubsidized ships.

23. Unless emergency relief occurs, the domestic tanker industry and the U.S. taxpayer will almost certainly be faced with a *fait accompli* whose effects could not be undone by any relief resulting from an ultimate finding that MarAd/MSB has acted unlawfully. After the delivery of the SS STUYVESANT and the MarAd closing—both are slated for September 23, 1977—the financial

affairs of the many participants in the proposed STUYVESANT transactions will be so intertwined that sorting out the pieces and restoring the parties to their pre-"closing" positions will be almost impossible. Indeed (as described in the following paragraph), it would seem that MarAd could never be placed in a pre-closing position having once guaranteed a huge amount of new Title XI debt on the vessel. *Its* potential liabilities for Title XI guarantees will have more than doubled.

24. At the present time (prior to implementation of the MarAd actions protested herein) MarAd has committed the United States to $28,845,000 in presently-placed Title XI debit in respect of the STUYVESANT. That is, if Seatrain/Polk were to default on its presently outstanding Title XI debt, MarAd would be liable for $28,845,000 in obligations which it has insured against default. If the contemplated Title XI closing (among MarAd, Seatrain/Polk, General Electric Credit Corporation, Chase Manhattan Bank and others) take place, MarAd will have guaranteed an *additional* $31,355,000 in Title XI obligations. If the pending motion for emergency relief is not granted, and assuming that plaintiffs ultimately prevail on the merits, the following consequences will ensue. The Sohio domestic charter will be declared unlawful in violation of Section 506 restrictions. That declaration of illegality will almost certainly cause Queensway (the bareboat charterer of the vessel) to default in its charter hire obligations, thus setting the stage for further litigation seeking an (administrative of judicial) declaration of the rights as between the bondholders, MarAd, Queensway, and General Electric Credit Corporation (GECC), the equity participant in the complex leveraged-lease, Title XI transaction (scheduled for September 23, 1977). The exact outcome of such a complex dispute is impossible to predict, at least not without opportunity to examine all the documents which the parties to the transaction intend to execute. The Maritime Administration, having pledged the full faith and credit of the United States with respect to all the Title XI obligations (including $31,355,000 in *new* obligations), is the party which could very well bear the financial brunt of its own illegal actions.

25. Thus, if the proposed "cleansing" and "closing" are allowed to proceed, an additional $31,355,000 of government funds will be placed at risk in the "second mortgage" Title XI guarantee tier; the financial lessor (GECC) will have purchased the vessel and the purchasers of the Title XI "second mortgage" obligations will have committed their funds. Later developments in this case could force an unwinding of these financial arrangements with serious consequences to the financial parties, as well as exposing the government to large monetary losses on its guarantees.

/s/

Signed and sworn before me this 22nd day of September, 1977.

/s/

SHIPBUILDERS COUNCIL OF AMERICA
800 New Hampshire Ave., N.W.
Washington, D.C. 20037

September 20, 1977

Dear Mr. Secretary:

The recent decision of the Maritime Subsidy Board in approving a revised financing plan under which the 225,000 dwt tanker STUYVESANT—built by Seatrain Shipbuilding Corporation, Brooklyn, NY with $27,200,000 in construction differential subsidy (CDS) funding and a Title XI Federal ship mortgage guarantee of $28,845,000 —would be permitted to operate as a Jones Act vessel and in worldwide trade through repayment of CDS over a period of 20 years with interest was discussed at considerable length by our Shipbuilding Committee at its meeting in New Orleans, Louisiana, on September 14, 1977.

It is our understanding this decision contemplates a redetermination of the actual construction cost of the STUYVESANT and an additional Title XI obligation in the amount of $31,355,000.

I am therefore instructed to convey to you the unanimous concern of those present with respect to the implications of this decision as affecting (1) a precedent whereby others may be tempted to seek the same deviation from long-standing policy, (2) the statutory obligation of the Congress to continue to provide CDS funds, (3) the prospects of newbuilding opportunities for Jones Act ships, (4) the current or prospective availability of Jones Act vessels built specifically for domestic trade operations, and (5) the inherent movement toward putting the Federal Government in the questionable role of banker in refinancing, over a long term, at probably less than commercial rates of interest, a straitened project which had

been initially supported by public funds and guaranteed by the full faith and credit of the public treasury.

It was clearly the consensus of our Committee that this entire procedure is not compatible with the motivating intent of the Congress in providing CDS funds for ships to transport a "substantial portion of the waterborne export and import foreign commerce of the United States."

Recognizing the improbability of reversing the Board's decision in the current instance, despite the merits of any contrary position, I am further instructed to request, most respectfully, that the Maritime Administration take immediate steps, through rulemaking and otherwise, to ensure that further breaches of established CDS policy will not be entertained. Under no circumstances, in our view, should the STUYVESANT decision be considered as a precedent for other improvident arrangements.

With best personal regards always, I am

Cordially,

/s/ Edwin M. Wood
EDWIN M. WOOD
President

Honorable Robert J. Blackwell
Assistant Secretary of Commerce
for Maritime Affairs
Maritime Administration
Washington, DC 20230

Civil Action No. 77-1645

Civil Action No. 77-1647

[Filed Sept. 28, 1977—James F. Davey, Clerk]

[Caption Omitted in Printing]

MOTION OF INTERVENOR-DEFENDANTS SEATRAIN AND POLK TO DISMISS

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, intervenor-defendants Seatrain and Polk move that the Complaints in these actions be dismissed on the grounds that (1) plaintiffs have failed to allege facts sufficient to establish standing to assert the claims set forth in the Complaints, and (2) accepting, for purposes of this Motion, the well-pleaded allegations of the Complaints as true, the Complaints fail to state claims upon which relief can be granted. In the alternative, intervenor-defendants move for such other relief as the Court may deem appropriate to dispose of the legal issues raised by the pleadings on or before September 30, 1977. The basis for these motions is set forth in intervenor-defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss and in Opposition to Motions for Preliminary Injunction.

As explained in that Memorandum and the accompanying affidavits, it is critical to the intervenor-defendants that the transactions complained of in the Complaints close on September 30, 1977. If the closing is postponed beyond that date, it is likely that the transactions will never be consummated. In that case plaintiffs will have succeeded, by the expedient of delay obtained through

Temporary Restraining Orders and Preliminary Injunctions, in obtaining all the relief they seek on the merits —to bar the STUYVESANT from competing in the domestic trade.

Because of the shortness of time and the extreme importance to the parties in having this matter resolved prior to September 30, intervenor-defendants respectfully request that this Motion to Dismiss be considered at the hearing scheduled for September 29 on the Motions for Preliminary Injunction.

Respectfully submitted,

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[Filed Sept. 28, 1977—James F. Davey, Clerk]

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

* * * *

II. THE AUGUST 31, 1977 ACTIONS WERE LAWFUL

The starting point for an understanding of the issues presented is the Merchant Marine Act, 1936, itself. Congress has specifically granted the Secretary and her delegees, MarAd/MSB, "the functions with respect to the making, amending and terminating [of Title V] subsidy contracts." [6] The amendment of a CDS contract to permit acceptance of a CDS repayment and release of § 506 trade restrictions is an exercise of this contracting authority, apparent from the plain words of the Act, and recognized in the Secretary's interpretations of the Act concurred in by the Comptroller General and Congress.

Under the Act, the Secretary of Commerce is given broad powers to administer the maritime functions of this country, which she has delegated to the Assistant Secretary of Commerce for Maritime Affairs and to the Maritime Administration/Maritime Subsidy Board. The Secretary has the responsibility to keep current on the total spectrum of the maritime industry and "to study all maritime problems arising in the carrying out of the policy set forth in Title I of this Act." Section 212(a). As noted by the Senate Committee on Commerce in 1935,

> "The Authority [Secretary] is given a considerable amount of discretion in the solution of its problems . . . . Shipping is a business of a highly competitive and changing nature and its governmental contract must be given the power to prompt decision in dealing with situations as they arise." S. Rept. No. 713, 74th Cong., 1st Sess. at 4 (1935).

Title V of the Merchant Marine Act establishes a construction-differential subsidy program in recognition that it costs more to build a ship in American shipyards than in foreign shipyards. Vessels for the United States domestic trade are required to be American-built, -owned and -registered under the Jones Act, Section 27 of the Merchant Marine Act, 1920,[7] as amended, 46 U.S.C. 883, as amended. Ships in foreign trade are not so limited and, absent some equalizer, would be built in foreign

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[6] *See* Reorganization Plan No. 21 of 1950, § 105(1), 64 Stat. 1273 (1950) (creating Martime Administration and creating and delegating contractual powers to Federal Maritime Board), as amended by Act to Amend the Merchant Marine Act, 1936, Pub. L. 91-469, 84 Stat. 1036 (1970) (designating Assistant Secretary of Commerce as Maritime Administrator); and Reorganization Plan No. 7 of 1961, 75 Stat. 840 (1961) (creating and delegating contractual powers of Federal Maritime Board to Federal Maritime Commission) as amended by Act to Amend the Merchant Marine Act, 1936, Pub. L. 91-469, § 201, 84 Stat. 1036 (1970) (as summarized above), as implemented by various departmental orders.

Even where the authority to amend is not expressly granted as here, the United States Court of Claims has held

> In general, an officer authorized to make a contract for the United States has the implied authority thereafter to modify it, particularly where as here, it is in the best interests of the United States to do so. *Whitman* v. *United States*, 110 F. Supp. 444, 450 (Ct. Cl. 1953).

[7] The Jones Act has no application to the issues in this case. The STUYVESANT qualifies for domestic trade under the Jones Act because it is and will be American-built, -owned and -registered. The only impediment to domestic trade by the STUYVESANT is the CDS restriction in its contract.

shipyards at a cheaper cost. To stimulate shipbuilding in American shipyards and to enlarge the number of American-owned ships, Title V authorizes the Government to subsidize the construction in American shipyards of ships intended for use in foreign trade. In 1970, Congress amended the 1936 Act to provide, *inter alia*, that the United States would pay construction-differential Title V subsidies for liquid bulk vessels including tankers such as the STUYVESANT.[8]

The CDS statutory scheme becomes apparent from a section by section analysis of Title V. Section 501 provides for applications to the Secretary of Commerce for CDS and vests broad discretion in the Secretary to determine eligibility for subsidy including economic feasibility. Sections 502 and 504 contain the basic CDS contracting authority. And once again it is broad in accord with the Act's basic grant of contracting authority. Section 503 provides that CDS-built vessels shall be documented under the U.S. flag and remain so documented, in the case of tankers, for 20 years. Section 505 provides that the construction be accomplished in a United States shipyard with the use of articles, materials and supplies made in the United States. Finally, as relevant to this proceeding, § 506 provides that owners of vessels for which CDS has been paid "shall agree" that their vessels will be limited to foreign trade and provides for the repayment of CDS when the vessel is operated in the domestic trade under enumerated circumstances.

As can be seen, the statute is specific only insofar as it establishes requirements for eligibility, pricing, place of shipyard, and employment. The implementation and the details of the economic and other judgments involved in the subsidy contract decisions are matters left to the Secretary's discretion. Since its enactment in 1936, Con-

[8] P.L. 91-469, §§ 4-6; 84 Stat. 1018-23 (1970).

gress has amended the Act several times. In 1970, a total re-enactment occurred.[9] From 1936 on, the Secretary and her predecessors administered the CDS program and made, amended, and terminated CDS contracts. These amendments have included the acceptance of CDS repayment and the release of § 506 trade restrictions.

In 1964, Grace Line determined that two vessels for which CDS has been paid for reconstruction could not be operated as originally intended and therefore sought to repay to the Government the unamortized construction-differential subsidy and amend its CDS contracts to remove the trading restrictions required by § 506. The Secretary sought the opinion of the Comptroller General of the United States on whether he agreed with the Secretary "that the Maritime Subsidy Board has the authority to amend construction-differential subsidy contracts . . . so as to free the vessels from the restrictive provisions incorporated therein pursuant to Section 506 of the Merchant Marine Act of 1936, as amended." By the Opinion of the Comptroller General B-1055039, 44 Comp. Gen. 180 (1964), 15 Pike & Fischer SRR 10, 209 the Secretary's view that he had the authority was sustained.

Significantly, the issue was not whether the Secretary had the authority to amend the CDS contract but rather whether there was anything in § 506 which precluded this particular amendment. The Comptroller General concluded that the Secretary did have the authority to accept CDS repayment and could on the basis of such repayment remove the § 506 restrictions as to trading area. The Comptroller General reasoned that the § 506 trading restrictions were keyed to the effective life of the vessel and did not permanently bar a CDS-built vessel from domestic trade. Entry into the domestic trade could occur either at the end of a vessel's economic life or earlier, under certain time and place limitations and

[9] P. L. 91-469, 84 Stat. 1018 *et seq.* (1970).

with the consent of the Secretary, so long as pro rata CDS repayments were made taking into account the useful life of the vessel. Thus the Comptroller General held:

> "[I]t appears that if the Government receives the full benefit of its subsidy by the owner's operations in the foreign trade and the compliance with the other construction differential subsidy contract obligations for the statutory life of the vessel, *or*, if, *in the case of a vessel which has not reached the end of its statutory life, the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel; that is, he should not be required to make further repayments and should not be bound to operate the vessel exclusively in foreign trade.*" 44 Comp. Gen. at ——, 15 Pike & Fischer SRR at 10, 214. (Emphasis added.)

Essentially, the Comptroller General found that a CDS contract is for a specific period of time, and, as the vessel is used under the contract, the subsidy is in effect being amortized or paid off. Thus for each year the vessel operates in the foreign trade there is amortized for the vessel 1/20 of the CDS payment. The Comptroller General therefore concluded that if the CDS is in effect amortized over a period of time, then one can effectively accelerate the amortization by repayment of the CDS. As long as all the CDS is repaid, the *quid pro quo* for the payment of the CDS, the vessel's foreign trade obligation, is satisfied.

As Judge Bryant noted in *American Maritime Association* v. *Stans*, 329 F. Supp. 1179 (1971), *aff'd*, 157 U.S. App. D.C. 394, 485 F.2d 765 (1973):

> "A long-standing administrative interpretation applying to a substantially reenacted statute is deemed to have received congressional approval and has the effect of law. *Commissioner* v. *Noel Estate*, 380 U.S. 678, 682 (1965)." 329 F. Supp. at 1185.

The Secretary's interpretation of her CDS repayment authority affirmed by the Comptroller General in his *Grace Line* opinion, has withstood not only the reenactment of the Merchant Marine Act in 1970 but more importantly was fully considered by Congress in 1972 in connection with amendments to Title XI of the Act.

The purposes of the 1972 Title XI amendments were to improve the responsiveness of the Act to the current financing needs of the shipbuilding industry and to simplify the mechanics of issuing and marketing its obligations. A new section of Title XI was proposed to respond to the Grace Line situation—the full repayment of a construction-differential subsidy and the resultant removal of § 506 trade restrictions. The proposed new section *as introduced* to the House by the then Chairman of the House Committee on Merchant Marine and Fisheries, read:

> "Sec. 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> * * * *
>
> "(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, *in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions*; or . . . . H.R. 9756,

92d Cong. 1st Sess., at 7-8 (1971). (Underlining added.)

The plain words of this proposed section speak to the Secretary's authority to accept CDS repayment in order to release § 506 restrictions. The section facilitated such action by authorizing guarantees to financing and recognized that such action by the Secretary was committed to discretion.

The CDS repayment guarantee section did not ultimately become enacted in the form proposed. It was amended to eliminate the underlined language. As is clear from the history, the amendment did not constrict but expanded the section's coverage. The House Report states as follows:

> Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent

> situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language quoted above. The paragraph in Title XI does not in any way extend or affect the application of Title V of the Act. H.R. Rep. 688, 92d Cong. 1st Sess., at 9-10.

This language once more envinces an awareness by Congress of the Secretary's authority to accept CDS repayment and to release § 506 restrictions. The Grace Line situation was expressly noted. While Congress declined the opportunity for general legislation to circumscribe the Secretary's discretion to deal with the unusual situation, § 506 was obviously not considered an impediment to full CDS repayment and release because Congress cited § 506 in expanding the guarantees to cover partial repayments under that section.

The Commerce Department supported § 1104(a)(3) as amended, noting that it rested on the Secretary's powers under Title V as a whole, not merely § 506. The General Counsel of the Commerce Department stated:

> The proposed legislation would also permit the Secretary of Commerce to guarantee or to make a commitment to guarantee payment of the principal of and interest on an obligation which aids in financing in whole or in part the repayment of the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. This provision in Title XI does not in any way extend or affect the application of Title V of the Act. As drafted, the language of the bill would preclude the use of Title XI assistance from being available for repayment of construction-differential subsidy in cases where only a partial repayment is being made. This restriction is unnecessary, and that language should be modified accordingly. H.R. Rep. 688, *supra*, at 17.

With respect to accepting repayment and releasing restrictions, the Title V authority relied upon by the General Counsel must be the power to contract. No reading of Section 1104(a)(3) as proposed, its subsequent amendment or its history can support the plaintiffs' proposition that § 506's partial repayment authority precludes the Secretary's authority to accept total repayment and release restrictions.

Despite the tone of plaintiffs' papers, the Secretary's CDS repayment authority comes as no surprise to the industry. For example, James J. Reynolds, the President of the American Institute of Shipping testified at the 1971 Congressional Hearing as follows about § 1104(a)(3):

> The bill would also authorize the use of title XI guarantee in financing repayment to the Government by a shipowner of construction-differential subsidy received in the construction of a vessel in order to free it from all restrictions imposed as a result of the subsidy.
>
> For instance, if a vessel was built with construction-differential subsidy and the owner wishes to buy out the subsidy in order to qualify it for other types of activities, the transaction could be financed under the bill so that he could buy out the subsidy and make the vessel eligible for other services which would be consistent with the objectives of the whole national program. Proposed Amendments to the Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong. 1st Sess. (1971), at 225.

Later in his statement, Mr. Reynolds noted the joint support for the bill and its parallels to the remainder of the Merchant Marine Act, 1936:

> I would only reiterate my confidence in this bill as the culmination of considerable effort on the part of ship operators, Government, and the financial community, to bring the title XI section up to date so it does indeed prove to be a useful parallel to the basic Merchant Marine Act which you gentlemen in this Congress passed last year. *Ibid.* at 225.

This spirit was reflected in the Committee Chairman's comment "I do not believe that this is a controversial bill and I am unaware of any opposition to it." *Ibid.* at 193.

Since the 1972 amendment to Title XI, the Secretary has exercised her Congressionally recognized power to accept CDS repayment and release restrictions in one case other than the STUYVESANT. On August 10, 1977, the Maritime Subsidy Board permitted the Wilmington Trust Company to free itself of 506 restrictions by repaying CDS on the date of delivery of two new LNG tankers. The repayment of CDS was guaranteed pursuant to Title XI. While the vessels involved were LNG tankers and the immediate trade involved was not domestic, the principle was exactly the same. The Board accepted CDS repayment and lifted § 506 restrictions. The Board furthermore facilitated CDS repayment by guaranteeing financing under Section 1104(a)(3). Letter to Wilmington Trust from James F. Dawson Jr., Maritime Subsidy Board, dated August 10, 1977.

What exists here is more than a long-standing administrative interpretation applying to a substantially re-enacted statute [10] which is deemed to have received congressional approval has the effect of law.[11] In *NLRB*

[10] As noted above, the statute was re-enacted in 1970, post *Grace Line*.

[11] *American Maritime Association* v. *Stans*, 329 F. Supp. 1179, (1971), *aff'd* 157 U.S. App. D.C. 394, 485 F.2d 765 (1973). *See Red Lion Broadcasting Co.* v. *Federal Power Commission*, 394 U.S. 367 (1969), where the Court noted:

> "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." 395 U.S. at 381.

v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), the Supreme Court stated:

> "In addition to the importance of legislative history a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted a statute without pertinent change. In this circumstance congressional failures to reverse or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight." 416 U.S. at 274-75.

The evidence here is not only persuasive, it is conclusive. By its 1972 amendments to Title XI facilitating the repayment authority, Congress expressly approved that authority. No other conclusion is possible.

* * * *

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF ROBERT BROWN

ROBERT BROWN, on oath deposes and says:

1. I am the Vice President-Finance of Seatrain Lines, Inc., parent corporation of intervenors Polk Tanker Corp. ("Polk") and Seatrain Shipbuilding Corp. ("Seatrain"). I am fully familiar with the history of the vessel STUYVESANT and the financing arrangements which have been made in regard to its sale.

2. The STUYVESANT is a 225,000 dwt very large crude carrier ("VLCC") built at the Seatrain shipyard, Brooklyn, New York, the former Brooklyn Naval Yard. The STUYVESANT is the third of a series of identical 225,000 dwt tankers to be constructed by Seatrain at its shipyard.

In 1969 Seatrain entered into a long-term lease for the yard and the facilities with the current owner of the yard, Commerce Labor Industry Corporation of Kings, who, utilizing grants from the City of New York, had taken over the yard after the Navy closed its operation.

3. Seatrain arrived at its decision to enter the shipbuilding business at a time when the projected international demand for crude carriers was steadily rising, and when all projections indicated there would be a shortfall of available tonnage by the time the vessels were completed. Seatrain has invested approximately $38,000,000

of its own funds in modernizing the yard, training the work force, and generally making the yard a working civilian shipbuilding facility.

4. The conversion of the Navy facility to a civilian shipyard was strongly encouraged by the local governments of New York and the Economic Development Administration ("EDA"), a branch of the U.S. Department of Commerce. The yard is located in the Bedford-Stuyvesant area of New York, an area of chronic high structural unemployment. It currently employs approximately 2,200 workers. Of the yard's employees, approximately 85 percent are members of disadvantaged minorities, substantially all of whom were previously unemployed, and who have been trained by Seatrain as part of the manpower training program undertaken by EDA and Seatrain. A portion of the yard's development was financed through $42,000,000 in loans 90 percent guaranteed by EDA and through an additional $5,000,000 borrowed directly from EDA.

5. The first two vessels, the BROOKLYN and the WILLIAMSBURG, were constructed with the aid of Construction-Differential Subsidy ("CDS") to cover the difference in the construction costs between building the vessels in the Seatrain shipyard and in a foreign facility. These ships were completed on December 31, 1973 and December 31, 1974, respectively. At the time of their delivery they were subject to long-term charters to American Petrofina, Inc. Currently, both vessels are in lay-up.

6. In January, 1975 Seatrain was forced to cease construction on the next two vessels, the STUYVESANT and the BAY RIDGE which were then being constructed in its shipyard with the aid of CDS. This action came about as a result of the severe downturn in the demand for tankers which occurred as a result of numerous factors, primary among these being the oil embargo following the 1973 war in the Middle East, the increase

in the price of crude oil and the subsequent downturn in the world economy resulting therefrom, and the presidential veto of the Energy Transportation Security Act of 1974. The halt in the construction of the STUYVESANT and the BAY RIDGE required Seatrain to lay off substantially all of its 2,500 man work force.

7. Later in 1975, following the layoffs, Seatrain negotiated with EDA for an additional $40,000,000 in 90 percent government guaranteed bank debt to reopen the shipyard and recommence construction on the STUYVESANT and the BAY RIDGE. The yard was reopened in April, 1975, although it took a number of months to bring the operation up to speed. The shipyard workers were recalled and training was recommenced. Approximately 90 percent of the workers laid off returned to their former positions upon recall, indicating that substantially all of them had been unemployed during the layoff period.

Plans for the building of a fifth vessel, on which construction had not begun, were cancelled.

8. From the time it reopened the yard and resumed construction on the STUYVESANT and BAY RIDGE, Seatrain actively sought employment for these vessels. It was able to interest Standard Oil Company of Ohio ("SOHIO") in chartering the STUYVESANT.

9. Serious negotiations with SOHIO commenced during December, 1976. Initially Polk attempted to secure from SOHIO a long-term charter for the vessel, but, following lengthy negotiations, the parties executed an agreement on June 21, 1977 specifying a three-year time charter. The agreement called for delivery of a vessel qualified to operate in the coastal trade, which is considered domestic trade.

Having signed this time charter, Polk was, for the first time, in a position to offer the STUYVESANT for

sale in the leveraged lease type of financing transaction which Seatrain affiliates previously had utilized in the sales of the BROOKLYN and WILLIAMSBURG. Polk retained SHS Leasing Corporation, a subsidiary of Shearson Hayden Stone to attempt to place the vessel in a leveraged lease transaction. Such a leveraged lease is the usual financing device utilized in the sale of vessels the size of the STUYVESANT. (The details of the STUYVESANT lease transaction are contained in paragraphs 16-20 of this affidavit.)

10. The pool of available financing institutions for a transaction of this magnitude and complexity is limited. This is due to the size of the transaction in terms of dollars, the risks involved, the knowledge of the maritime business required, and, especially, the need to close the transaction timely prior to the required delivery of the vessel to SOHIO on September 30, 1977.

A leveraged lease agreement involving the STUYVESANT is dependent upon the existence of the SOHIO time charter. Without this time charter it is unlikely that a financial institution would agree to purchase the vessel. Under the terms of the time charter, Polk is required to deliver the vessel to SOHIO no later than September 30, 1977. The crucial element in consummating the sale of the vessel, therefore, was meeting the September 30, 1977 deadline, by which time the vessel had to be delivered to SOHIO and the concurrent closing completed.

11. Negotiations were commenced with General Electric Credit Corporation ("GECC"), the financial institution which had purchased both the BROOKLYN and the WILLIAMSBURG. GECC's familiarity with the documents necessary to close the BROOKLYN and WILLIAMSBURG leveraged leases gave them a capability to process the transaction within the time allowed.

12. Upon reaching a tentative agreement with GECC, Polk approached the Maritime Administration to secure MarAd approval for use of the vessel in the coastwise trade for the three-year period of the SOHIO lease, and for additional financing under Title XI of the Merchant Marine Act.

13. On July 8, 1977, Polk formally applied to the Maritime Administration requesting special permission to operate the vessel for three years in the coastwise trade pursuant to Section 207 of the Merchant Marine Act. In its application, Polk made it clear that it had filed its request because of Seatrain's difficult financial situation and because of the large amount of Polk's and Seatrain's government guaranteed and insured indebtedness. Notice of Polk's July 8, 1977 application was published in the *Federal Register* on July 19, 1977. Following this publication, the Maritime Administration received numerous protests against the application.

Believing that these protests seriously jeopardized its chance to obtain Maritime Administration approval of its application by the crucial September 30, 1977 date, Polk withdrew the application.

14. Polk decided to restructure the financing transaction so as to provide for a complete and unconditional repayment of the CDS. Under the precedent established by the Maritime Administration, and approved by the Office of the Comptroller in the Grace Lines decision, Polk believed such a total repayment would result in the STUYVESANT's being qualified to engage in both the domestic and foreign trades. Polk further believed that, in view of the Grace Lines precedent, this qualification could be readily accomplished before September 30, 1977.

On August 25, 1977, therefore, Polk formally withdrew its application for permission to operate the vessel for three years in the coastwise trade pursuant to Sec-

tion 207 and submitted instead a request to fully repay the CDS. This repayment is to be accomplished with a note payable by Polk to be assumed by the trustee for GECC as part of the leveraged lease financing transaction.

15. In response to the Polk application, the Maritime Administration and the Maritime Subsidy Board issued letters on August 31, 1977 stating that the Maritime Subsidy Board had acted on August 30, 1977 to allow the sale of the vessel to United States Trust Company, ("USTC") as owner-trustee, authorized the repayment of the CDS in the form of a promissory note to be assumed by the owner-trustee, secured by a third preferred ship mortgage, and authorized the amendment of the CDS contracts to release the vessel from most, but not all of the obligations in those contracts (retaining engineering and requisition rights on the vessel).

16. Upcn closing, the vessel will be transferred by Polk, which presently has rights to the vessel under its construction contract with Seatrain, to the United States Trust Company as trustee for GECC, the "equity owner." USTC will assume a twenty-year note executed by Polk in favor of MarAd in the full amount of the CDS issued to Polk on the STUYVESANT ($27,200,000). The note will be payable in level semi-annual installments of principal and interest. It will be secured by a third preferred ship mortgage on the STUYVESANT, and by an interest in the bare-boat charter, time charter and Seatrain Security Agreement described below.

USTC also will assume responsibility for $60,200,000 of government insured indebtedness on the vessel. The indebtedness consists of $28,845,000 of what is known as Tier I, Title XI insured indebtedness, originally issued as a construction loan on the STUYVESANT, and $31,355,000 in what is known as Tier II, Title XI insured indebtedness which will be incurred at the closing. $28,600,000 of the proceeds of this last indebtedness is pledged to repay EDA guaranteed bank debt of Seatrain Shipbuilding Corp.

17. The Title XI bonds, which are insured by the U.S. Government, were put up for sale September 6 and 7, 1977. They were sold to nine institutional investors with an expected closing date of September 23, 1977. They carry a 7.95% rate of interest. This rate of interest also determines the rate of interest on the $27,200,000 note issued for the repayment of the CDS.

When the closing was postponed from September 23, 1977, the Investment Bankers, Kuhn, Loeb & Co., Incorporated, were able to hold the placement through September 30, 1977 although counsel for the purchasers had not committed the purchasers through September 30. However, as interest rates have been rising since September 6, a new issue of bonds would have to be sold if the transaction were delayed beyond September 30, 1977. The new issue would not only carry a higher interest rate, but would also delay the closing substantially, as it takes time to get a date for the sale of new bonds, and then takes two weeks from date of sale to date of closing.

18. Finally, USTC will pay Polk $32,600,000 in cash. These cash proceeds are to be placed in an escrow account entitled the "Seatrain Security Agreement". The funds in the Seatrain Security Agreement, together with the interest earned thereon, are held, as partial security for the benefit of GECC, the equity owner, for such time as it would be at risk in the event of a default on the "bareboat charter" hire. The bareboat charterer is the leasee of the vessel. There is an increasing risk during years 1, 2 and 3 of the charter, and then, subsequently the risk decreases, although it continues throughout the life of the lease. In addition, the Seatrain Security

Agreement, to the extent not pledged to GECC, is also subject to a security agreement to MarAd.

19. Thus, the total purchase price USTC will pay for the vessel is approximately $120,000,000. ($27,200,000 assumed note, $60,200,00 assumed bonds and $32,600,000 cash.)

One of the most important factors making this financing transaction attractive to GECC is that, as the "first user" of the vessel for U.S. corporate income tax purposes, GECC will be able to avail itself of a large investment tax credit. Without this investment tax credit, GECC would not be interested in the arrangement. It is, therefore, imperative that the sale of the vessel to USTC, as trustee for GECC, be completed prior to the vessel's being placed into service under the SOHIO or any other charter.

In fact, in the case of the STUYVESANT, if GECC cannot qualify as the "first user" of this vessel, the benefits of the investment tax credit on the vessel will be entirely lost, thus substantially diminishing the value of the asset. This is because Polk, in the absence of another party willing to purchase and lease the transaction, would be forced to retain ownership of the vessel. Assuming the continued existence of the SOHIO charter, Polk would thereby become the "first user" of the vessel for purposes of the investment tax credit. Because both Polk and the consolidated group of which Polk is a member have substantial tax loss carry forwards, and substantial investment tax credit carry forwards, they would be unable to utilize the investment tax credit, and it would be lost.

20. Under the financing agreement as presently constituted, USTC will "bareboat charter" the vessel to Queensway Tankers for a period of twenty years. Queensway is not affiliated with any other party to the financing

transaction. The bareboat charterer is the leasee of the vessel, and operates the vessel, providing crew, provision, and fuel. The bareboat charter hire is paid to USTC as trustee for the equity owner, which in turn pays the debt on the vessel and the balance to the equity owner as a return on its investment.

Queensway, in turn, will be assigned the "time charter" of the vessel to SOHIO for three years. During the term of the time charter, SOHIO is free to utilize the vessel in whatever manner it desires. As time charterer, SOHIO directs where the vessel is to operate and what cargo it will carry. By telex dated September 24, 1977 SOHIO instructed Polk to dispatch the vessel from its berth in San Francisco so that it can arrive in Alaska on September 30, 1977 for loading. Pursuant to this directive, the STUYVESANT is enroute to Valdez.

As can be seen from the above description, the financial transaction involves many elements, each of which must be completed prior to midnight, September 30, 1977. That is the time at which GECC's commitment to purchase the vessel expires, the last day for delivery to SOHIO under the time charter. Of course, if SOHIO commences use before the sale is completed, the sale will be cancelled.

As has been pointed out previously, the extreme complexity of the STUYVESANT's financing makes it highly unlikely another equity owner can be found for the vessel if GECC's commitment is allowed to expire. It would be impossible to find another such equity owner prior to September 30, 1977.

DAMAGE TO POLK-SEATRAIN

21. The sale of the STUYVESANT was originally scheduled for closing on September 23, 1977. This closing was prevented by the issuance of temporary re-

straining orders on September 22, 1977. As a result of failing to close on September 23, 1977, Polk, on September 24, 1977 suffered a loss of approximately $50,000 and it will continue to incur losses at the rate of approximately $40,000 per day for each day from September 24 through September 30, 1977.

These figures include penalty interest which will have to be paid GECC, interest on the various mortgages which were to be assumed on closing by USTC as trustee for GECC, and the operating, fuel and port costs which Polk will continue to incur because it was prevented from delivering the vessel on September 23, 1977.

Polk's loss, through September 30, 1977 directly attributable to its being prevented from closing on September 23, 1977 totals approximately $294,000.

22. If Polk is prevented from closing on September 30, 1977 the entire leveraged lease transaction as described above could disintegrate because of GECC's release from its firm commitment.

Potential losses arising from the failure to close on September 30, 1977 approximate $35,600,000.

This figure represents the total of:

1. Polk's lost profits under the transaction as presently constituted (approximately $4,500,000);

2. Interest and amortization on the over $56,000,000 of debt which was to be assumed by USTC as trustee for GECC upon closing (totalling approximately $21,200,000);

3. The penalties Polk will have to pay GECC (totalling approximately $180,000);

4. The loss to Polk of the amortization of its equity (approximately $4,600,000); and

5. Polk's loss of interest income on the funds deposited pursuant to the Seatrain Security Agreement discussed above (approximately $5,200,000).

/s/ Robert Brown
ROBERT BROWN

Subscribed and sworn to before me this 25th day of September, 1977.

/s/ Laura May de Matteis
Notary Public for:

LAURA MAY DE MATTEIS

Notary Public, State of New York
No. 24-0915575 Qual. in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1979

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES CARTHAUS

JAMES CARTHAUS, on oath and deposes and says:

1. I am President of SHS Leasing Corporation a subsidiary of Shearson Hayden Stone, Inc. As part of my duties, I am fully familiar with, and regularly engaged in, the placing of large equipment leases for major capital equipment items such as large vessels. I am familiar with the market for such equipment leasing transactions, and make this affidavit on the basis of my knowledge of such market, and the particular facts known to me regarding the sale leaseback transaction involving the STUYVESANT.

When retained by Polk Tanker Corp. to place the financing on the STUYVESANT, I approached several large financial institutions for a placement of the lease, including General Electric Credit Corporation ('GECC'). It was my opinion that syndication of the proposed transaction would be very difficult given the time limits within which to complete the transaction and, therefore, the potential participants in the STUYVESANT transaction were limited to large financial institutions.

2. As initially proposed, the transaction provided that the vessel be qualified to engage in the coastwise trade for a period of three years, with repayment of CDS only for that period. GECC initially negotiated their agreement on this basis, and took Board of Director action approving this proposal subject to documentation.

3. After Polk changed the transaction to include a full repayment of CDS, negotiations took place with GECC and the form of the transaction changed to include the proposed total repayment of CDS.

Subsequently, the transaction was changed again a third time to include an assumption by GECC of both the interest and principal portion of the note repaying the CDS, and the GECC Board of Directors approved this agreement, subject to documentation.

4. It is my opinion that because GECC has already approved numerous alterations in the transaction it would be unlikely to consent to a change in the transaction which either changed the financial terms of the transaction or which would create uncertainty as to when the transaction would close. As practical businessmen, GECC will be unwilling to continue to hold their resources available in the face of substantial uncertainty as to when, if ever, the transaction will close.

5. It is also my opinion that it would be extremely difficult, if not impossible, to place this transaction with another purchaser/lessor on the same terms and conditions once GECC had walked away from the transaction. The potential universe of purchasers is limited. It would be well known in the industry that GECC had abandoned the transaction, and this knowledge might cause other large investors to avoid any transaction involving the STUYVESANT regardless of the merits of the transaction.

6. If the vessel is placed into service prior to its sale, one of the financial incentives which makes investment in such vessels attractive, *i.e.*, the investment tax credit, will be permanently lost. As a practical matter it would be impossible to find a lessor/purchaser for the vessel on the same terms and conditions as the GECC transaction unless that purchaser can avail itself of the investment

tax credit. Therefore, in the event that SOHIO were to insist on use of the vessel pursuant to my understanding of the terms of its charter, *i.e.*, commencing on September 30, 1977, future sale of the vessel would be extremely unlikely, and any sale would have to reflect the impaired value of the vessel as a result of the loss of the investment tax credit.

/s/ James Carthaus
JAMES CARTHAUS

Subscribed and sworn to before me this 26th day of September, 1977.

/s/ Zenobia Wilson
ZENOBIA WILSON

Notary Public, State of
New York
No. 24-4638064
Qualified in Kings County
Commission Expires
March 30, 1978

AFFIDAVIT OF ROBERT M. MACY, JR.

ROBERT M. MACY, JR., on oath and deposes and says:

1. I am a managing director of Kuhn Loeb & Co. Incorporated, investment bankers. We are assisting Seatrain Lines Inc. in the direct placement of $31,355,000 in Title XI guaranteed indebtedness on the STUYVESANT. I make this affidavit on the basis of my familiarity with the placement of the debt on the STUYVESANT and my familiarity with the government guaranteed debt market.

2. The bonds for the Tier II, Title XI guaranteed debt on the STUYVESANT were sold on September 6-8, 1977. They were purchased by nine institutional investors, and carry an interest rate of 7.95 percent per annum. Since that time, interest rates, including rates on this type of government guaranteed indebtedness, have increased. Since that time there has been an increase of between 10 and 15 basis points (.10 percent and .15 percent per annum) in the market for long term U.S. government securities.

3. Based on my familiarity with The Title XI debt market it is my opinion that in the event the transaction as presently constituted does not close September 30, 1977, the buyers would no longer consider themselves committed to the purchase. Assuming that Seatrain were immediately able to return to the market with these guaranteed securities, we would again have to request an offering period from the Maritime Administration. Recently we have had considerable difficulty in obtaining such a marketing period without significant delay because of existing scheduled commitments by the Maritime Administration to other Title XL [sic] issuers. Once a new initial offering date were established, a minimum of two weeks thereafter would be required prior to closing this transaction with the new purchasers.

4. It is the general commercial practice to receive a commitment from bond purchasers to purchase by a certain date. In the case of the STUYVESANT, the original closing date was September 21, 1977. However, a week before this scheduled closing date we obtained the purchasers approval for a delay in closing until September 23, 1977. Upon hearing of the need for a further last minute delay in closing because of the temporary restraining order, we again obtained the consent of the purchasers to a postponment [sic] in closing no later than September 30, 1977 although we were informed by counsel for the purchasers that in counsel's opinion the Purchase Agreement for these securities was then yet not legally binding.

It is our opinion that the remarketing of these government guaranteed securities would require a higher interest rate under current market conditions.

/s/ Robert M. Macy, Jr.
ROBERT M. MACY, JR.

STATE OF NEW YORK
ss.
COUNTY OF NEW YORK

Sworn before me this 26th day of September 1977.

/s/ Arthur S. Demarest
ARTHUR S. DEMAREST

NOTARY PUBLIC, State of
New York
No. 41-0914365 Queens County
Certificate Filed in
New York County
Term Expires March 30, 1979

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND TO DISMISS

The federal Defendants, by their undersigned counsel, hereby move this Court to dissolve the Temporary Restraining Order previously entered herein, and to dismiss this action, on the grounds that (1) the complaint fails to state a claim upon which relief can be granted; and (2) that the plaintiff lack standing to prosecute this action.

In support of this motion, the Court is respectfully referred to in the Memorandum of Points and Authorities filed herewith.

Respectfully submitted,

/s/ Barbara Allen Babcock/RJS
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
U.S. Attorney

/s/ Barbara O'Malley/RJS
BARBARA O'MALLEY

/s/ R. Joseph Sher
R. JOSEPH SHER

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Of Counsel

/s/ Michael J. McMorrow
MICHAEL J. MCMORROW
Assistant General Counsel
Maritime Administration
U.S. Department of Commerce

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND TO DISMISS

INTRODUCTION

The actions of the Secretary at issue before the Court are those taken on August 30, 1977. The first action was by the Maritime Subsidy Board, authorizing and agreeing to the total repayment of construction-differential subsidy (CDS) for the STUYVESANT. The second action was that of the Assistant Secretary for Maritime Affairs agreeing to a program of financial arrangements under Title XI of the Act with respect to that vessel.[1]

Plaintiffs' pleadings appear to enmesh and confuse two separate procedures undertaken by the Maritime Subsidy Board with respect to the repayment of CDS on the STUYVESANT. In the course of plaintiffs' dis-

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[1] The defendants are usually referred to throughout as the "Secretary." Part II. D. discusses the Reorganization Plans which vest in the Secretary of Commerce the authority to administer the construction-differential subsidy program and the Title XI financing program. The Secretary, in turn, created the Maritime Subsidy Board and delegated to it her authority for the construction-differential subsidy program, and delegated to the Assistant Secretary for Maritime Affairs her authority for the Title XI financing program (Department Organization Order 10-8, Sections 5 and 6 and Section 3, respectively).

cussion of these two distinct procedures, erroneous statements of fact occur. The facts are set forth below:

In June 1977, Polk Tanker Corporation, the owner of the STUYVESANT, applied for permission to engage in domestic trade, namely, the transport of oil from Alaska to the "lower 48" States. The application was premised on the authority found in Section 207 of the Act. The applicant fully stated and recognized the limited application of Section 506 of the Act.[2] This application was published in the Federal Register, 42 F.R. 37229, July 20, 1977, and comments were invited from interested persons. The publication clearly indicated that the legal premise upon which the request had been made was Section 207 of the Act. No mention or indication exists that the notice was in any way connected with a separate regulatory scheme dealing with implementation of Section 506 of the Act.[3]

Plaintiffs allege improper proecdures in connection with processing of the action taken by the Maritime Subsidy Board on August 30, 1977. They point *only* to the regulations implementing Section 506 of the Act, and point to no statutory or other regulatory provision governing

[2] Section 506 of the Act (46 U.S.C. 1156) contemplates only a temporary transfer to the domestic trade of a CDS vessel.

[3] Plaintiffs, throughout their filings, have represented that the publication was made pursuant to those separate regulations, which representation is completely erroneous. The regulations, published at 42 FR 33035, June 29, 1977, clearly identify Section 506 of the Act and are designed in accordance with that statutory provision to cover vessels built with CDS which *temporarily* would be allowed into domestic trade. An application under those regulations covers a CDS vessel which will remain a CDS and for which no permanent relief from the restrictions attendant to being a CDS is sought. The case at hand, in contrast, arises apart from Section 506 of the Act and apart from those regulations which implement Section 506 of the Act. It is the Secretary's position that neither Section 506 of the Act nor those implementing regulations in any way apply to the action of the Maritime Subsidy Board taken on August 30, 1977.

the type of request acted upon, namely, the total pay-back of CDS on a particular vessel built with CDS subsidy. No such statutory or regulatory provision requires notice and comment or hearing in such an instance.

Once the Maritime Subsidy Board acted with respect to the total pay-back of CDS on the STUYVESANT, discretionary review of that action was possible under Department of Commerce regulations (46 C.F.R. Part 202). No such review is authorized regarding actions by the Assistant Secretary of Commerce for Maritime Affairs regarding Title XI financing. One of the plaintiffs in these actions, Shell Oil Company, petitioned the Secretary of Commerce to undertake review of the Maritime Subsidy Board action. Numerous filings were made by Shell Oil Company and other interested persons. The action of the Maritime Subsidy Board became administratively final for want of any action by the Secretary under the regulations.[4]

The need for urgent consideration by the Court is real and present. The financing as authorized by the Assistant Secretary for Maritime Affairs under Title XI of the Act cannot be undertaken until confirmation of the proprietary [sic] of the action taken by the Maritime Subsidy Board with respect to the payback of CDS. Title XI financing, itself, is extremely complex, involves numerous parties and will be reflected in a great number of interrelated financing documents. The key to the timing question is the continued availability of a private source of money to carry out the financing, General Electric

[4] In this regard, it is the Secretary's position that the Temporary Restraining Orders barred any *implementation* of the acts of the Maritime Subsidy Board, but did not toll that action becoming administratively final by operation of duly promulgated regulations. No step in terms of implementation of the Maritime Subsidy Board actions (or the Assistant Secretary's Title XI action) has been or will be taken while the Temporary Restraining Orders are outstanding and until this Court rules on the petitions for injunctive relief.

Credit Corporation. A number of private investors have been lined up to contribute over $31,000,000 in return for securities which are to be guaranteed, under Title XI of the Act, by the full faith and credit of the United States. The financial arrangements depend on delivery of the STUYVESANT to SOHIO under subcharter by September 30, 1977. If the transaction is not consummated on or before that date, the subcharter will fail and the entire financial arrangement will collapse. Seatrain has submitted affidavits explaining the urgency of consummating the arrangements in place and setting forth the extremely severe consequences should the arrangement fail.

The Secretary will show that all actions taken herein were within her lawful authority and that the plaintiffs herein lack standing to maintain this action. Consequently, there is no basis for injunctive relief, whether preliminary or final.

STATEMENT OF FACTS

On June 20, 1972, the Maritime Subsidy Board (the Board) and Polk Tanker Corporation (Polk) executed a contract under Title V of the Act, 46 U.S.C. section 1101 *et seq.*, providing for payment to Polk of a construction-differential subsidy (CDS) for the construction of the STUYVESANT. Polk agreed, pursuant to Section 506 of the Act, *inter alia*, to operate the STUYVESANT in the U.S. foreign trade. Shell Complaint, para. 21.

The CDS payment enjoyed by Polk under this contract amounted to $27,200,000. Affidavit of Robert Brown, attached to Intervenor-Defendant's Motion to Dismiss, paragraph 16 (hereinafter Brown Aff.).

In order to support the retention in service of the Seatrain shipyard, the former Brooklyn Navy Yard and to

provide employment and training for hard core unemployed persons in the area, the Secretary through the Economic Development Administration, has loaned directly and guaranteed private loans, to Seatrain funds to the approximate total of $70,000,000. Brown Aff. paras. 4, 7.

Additionally, construction loans were guaranteed by the Secretary under Title XI of the Act with respect to the STUYVESANT to the amount of $28,845,000. Brown Aff. para. 16.

As the STUYVESANT neared completion, Seatrain sought employment for it. However, due to the depressed state of the international tanker market, no employment was found. In 1976, Polk begain negotiations with Standard Oil Company of Ohio (SOHIO) with a view to employing the vessel in the Alaskan oil trade. Brown Aff. para. 9.

After agreement was reached, Polk, on July 8, 1977, sought a three-year waiver of its contractual obligation to employ the tanker in the foreign trade of the United States. Brown Aff. para. 13.

The application was published in the *Federal Register* on July 19, 1977, and numerous public comments were received. Polk then withdrew its application. Brown Aff. para. 13.

On August 25, 1977, Polk submitted a request to repay the CDS and sought approval of the sale transaction and the SOHIO charter. Brown Aff. paras. 14 and 15.

On August 30, 1977, such permission was granted by the Board, paving the way for the multi-faceted financial transaction which is the basis of the complaints herein. Brown Aff. para. 15-20.

ARGUMENT

1. THE SECRETARY OF COMMERCE HAS LAWFUL AUTHORITY TO TAKE THE ACTION WHEREBY THE CONSTRUCTION-DIFFERENTIAL SUBSIDY ON THE STUYVESANT WOULD BE REPAID IN FULL

The Secretary asserts that authority for the action permitting repayment of construction-differential subsidy in full is found primarily under Section 504 of the Act (46 U.S.C. 1154) and Section 1104(a)(3) of the Act (46 U.S.C. 1274(a)(3)), and in Reorganization Plans No. 21 of 1950, Section 105 (64 Stat. 1273, May 24, 1950) and No. 7 of 1961, Section 202(b)(1) (75 Stat. 840, August 12, 1961). Additionally, the Secretary relies on a Decision of the Comptroller General (44 Comp. Gen. 180 (1964)).

A. *Section 504 of the Act*

Section 504 of the Act reads as follows, in part:

> If a qualified purchaser under the terms of this title desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this title, the Secretary of Commerce *may . . . contract* to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. . . . (Emphasis added)

This section vests in the Secretary basic discretionary authority to enter into contracts for CDS and the cost of national defense features added on to commercial vessels. No limitation appears within this section, or elsewhere within Title V of the Act or elsewhere in the Act, which prevents amendment, modification or termination of a CDS contract. Once a CDS contract is entered into as

a discretionary matter by the Secretary, the normal contractual rights of each party apply, and the contracts are subject to further mutual agreement as to modification or termination.

B. *Section 1104(a)(3)*

Section 1104(a)(3) of the Act became law in 1972. It *expressly* permits Title XI financing of debt created for the purpose of paying back CDS on a vessel built with such subsidy. The operation and the scope of this provision of law will be discussed *infra*. However, the central and crucial point is that this section *confirms* that CDS may be paid back. It is also significant, as will be explained more fully below, that the authority created by Section 1104(a)(3) of the Act was *not exercised or used* in the shipyard transaction involving the STUYVESANT. Plaintiffs' representations to the contrary are in error.

The bill enacted in 1972 (H.R. 9756, 92nd Cong. 2d Sess.) was first introduced with the following pertinent text:

> Section 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> * * * *
>
> (3) Financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the com-

petitive effect of releasing such vessel from such restrictions;

The section as finally enacted into law reads as follows:

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended;

The Department of Commerce endorsed the legislation. However, an amendment to the bill was recommended and explained in these words (House Report No. 92-688, 92nd Cong., 1st Sess., November 30, 1971, at page 17):

This provision in Title XI does not in any way extend or affect the application of Title V of the Act. As drafted, the language of the bill would preclude the use of Title XI assistance from being available for repayment of construction-differential subsidy in cases where only a partial repayment is being made. This restriction is unnecessary, and that language should be modified accordingly.

That same Report, at pages 9-10, accepted the suggested change:

Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions. In the entire history of the administration of the 1936 Act, there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has, therefore, amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act.[3]

Thus, Congress expressly sanctioned the principle of repayment of CDS and the concommitant expiration of restrictions imposed under section 506 of the Act. At the time, only one instance of a buy out had occurred. That instance is discussed *infra* part D. Congress not only included this rare instance, but expanded the provision to allow guarantee under Title XI of the more numerous partial repayments under section 506 of the Act. The language clearly indicates an awareness by the Congress of buy outs of CDS in two forms: the first being the partial buy outs specifically authorized in section 506 of the Act for *temporary* domestic service, and the second, totally distinct, a complete buy out apart from section 506 of the Act. The normal considerations in statutory construction, changes in bill texts, the wording as enacted into law, the legislative reports, the fact of later amendment within the same statute and legislative recognition of past administrative practice, compel the conclusion that the Secretary was invested with authority to agree to a complete buy out of CDS for the STUYVESANT.

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[3] *See also* Senate Report No. 92-1137, 92nd Cong., 2nd Sess., September 15, 1972, at page 9.

Plaintiffs place great reliance on the sentence "This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." It appears they wish that sentence to mean the direct opposite of the enacted law. The Secretary has shown that the two forms of CDS payback, one partial and one complete, are conclusively established by the above statutory analysis. The Secretary submits that the sentence in question was intended to preclude partial buyouts in excess of the strict six-month limit of section 506 of the Act. This interpretation permits both sections 506 and 1104 (a) (3) of the Act to operate as Congress intended. To accept plaintiffs' view would nullify the clear meaning of section 1104(a) (3). By all the familiar canons of statutory construction, that result should be avoided.

Therefore, this Court should find that the Secretary's action was within her authority under law.

C. *Reorganization Plans No. 21 of 1950 and No. 7 of 1961*

Reorganization Plan No. 21 of 1950, Section 105 transferred to the Federal Maritime Board (and now the Maritime Subsidy Board)

> (1) the functions with respect to making, amending, and terminating subsidy contracts, and with respect to conducting hearings and making determination antecedent to making, amending, and terminating subsidy contracts under the provisions of Titles V . . . of the Act. . . .

The terms "amending, and terminating subsidy contracts" and "under the provisions of Titles V" explicitly authorized the amendment and termination of CDS contracts. This function was transferred to the Secretary by Reorganization Plan No. 7 of 1961, Section 202(b) (1). The Secretary then delegated that same authority to the

Maritime Subsidy Board by an order now designated Department Organization Order 10-8, Section 6.01. Thus, the Reorganization Plans adopted pursuant to law after concurrence by the Congress of the United States explicitly support the investing of amendment and termination powers in the Maritime Subsidy Board with respect to CDS contracts under Title V of the Act.

In the matter of STUYVESANT, the Maritime Subsidy Board exercised this authority, not to terminate but only to amend the CDS contract. The CDS contract would survive in order that the United States might have the benefit of engineering and design data for building other vessels, as well as the right to purchase or requisition under Section 802 of the Act in time of war or national emergency.

D. *Decision of the Comptroller General*

Further authority for the action of the Secretary is found in the decision of the Comptroller General dated September 30, 1964 (B-155039, 44 Comp. Gen. 180). That case involved a request for concurrence by the Comptroller General in the view of the Secretary and the Maritime Subsidy Board that legal authority exists "to amend construction-differential subsidy contracts . . . so as to free the vessels from the restrictive provisions incorporated therein pursuant to section 506" of the Act. The Comptroller General analyzed the statutory development of section 506, distinguished the explicit authority for "temporary periods of domestic operations" and framed the basic issue as "whether an owner may accelerate his vessel's release from the section 506 restriction by prepayment of the unamortized balance of the Government's subsidy contribution." The Comptroller General analyzed the cost impact of construction-differential subsidy specifically in terms of its repayment. He concluded that the Secretary

> has the legal authority to amend the two [construction-differential subsidy] contracts involved to remove therefrom the section 506 provisions . . . upon repayment to the Government of the unamortized construction-differential subsidy paid by the Government for the reconversion of the two vessels.

This decision provides additional authority that amendment of CDS contracts in connection with total repayment of such subsidy is authorized by law. Plaintiffs' attempt to obscure this principle by distinguishing the factual situation before the Comptroller General from the factual situation involving the STUYVESANT. The Secretary submits that differing details do not obscure the basic principle at stake in this action, namely, that the Secretary may lawfully amend or terminate construction-differential subsidy contracts and accept full repayment of that subsidy.

The Maritime Subsidy Board publicly announced five separate actions over a period of a dozen years based on its lawful authority, apart from section 506 of the Act, allowing discretionary amendment or termination of CDS contracts concommitant with total payback of such subsidy.[4] There is no secret law or secret action bearing on this principle. There never has been.

Therefore, the Secretary's actions are fully authorized by law, and the complaints fail to state a claim in this respect.

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[4] This Decision is the only published decision involving complete CDS buy out. The Maritime Subsidy Board has authorized three other total payback situations. No challenge or appeal or protest resulted from these public actions. See affidavit of James S. Dawson, Jr. attached hereto.

E. *The Secretary May Accept a Note in Full Satisfaction of an Agreement to Repay CDS*

In respect of her responsibilities under the Act, and "to protect, preserve or improve collateral" held by her, the Secretary may enter into such contracts as may in her discretion be necessary "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." (Section 207 of the Act, 46 U.S.C. 1117) It is clear that Congress, in adding this provision to the Act, wanted

> to make clear a power which it is thought already existed . . . but about which some doubt has been expressed under the Act . . . . [The Secretary] has all the general and implied powers of a business corporation. (H.R. Rep. No. 2168, 75th Cong., 3rd Sess. (1938))

Among the powers granted to the Secretary is the power to accept and to execute financial documents which are in common commercial usage.

One such document is a note in the form of an unconditional obligation to pay a sum certain. In the present case, as part of the total transaction under which the STUYVESANT was to be put in service, the Secretary accepted, in discharge of the obligation to repay the CDS, a note of Polk Tanker Corp., together with an assignment thereof from Polk to United States Trust Company of New York, a New York bank as owner trustee under a Trust Agreement between said Trust Company and GECC. (Copies of the note and the assignment, as yet unexecuted due to this Court's Temporary Restraining Order are attached hereto for the convenience of the Court.) Under these instruments, the obligation to repay the CDS is now on the trust formed by said Trust Agreement and is without recourse to Polk.

The effect of this transaction, under common commercial practice is to discharge the obligation. See Uniform Commercial Code, Section 3-802(1):

> . . . where an instrument is taken for an underlying obligation (a) the obligation is pro tanto discharged if a bank is the drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor . . .

Thus, in common commercial practice, which the Congress has authorized the Secretary to adopt, the acceptance of a note such as the one here in issue discharges the obligation. All that the Secretary has done is to conform to such practice.

Moreover, plaintiffs' challenge to this aspect of the transaction exalts form over substance. Had the note run from Polk to United States Trust Company of New York, supported by a guarantee under Section 1104(a)(3) of the Act, plaintiffs would have been in the same position in which they now find themselves. The Secretary, too, would have faced the same risks she does under the present form of the transaction. Therefore, plaintiffs have no cause to complain.

F. *Plaintiffs have not been denied due process of law*

To the extent that plaintiffs seek to challenge this transaction on due process grounds, contending that a lack of regulations disclosing the conditions under which relief of this type would be generally available denies them due process of law, their claim is without merit. As we have seen, *supra*, Congress declined to legislate hard and fast rules for this sort of transaction when enacting the present section 1104(a)(3) of the Act because of its extreme rarity, and because each such transaction is *sui generis*. The Secretary is not required to issue regulations which cover every eventuality which

may be conceivable. Moreover, plaintiffs have not sought such regulations, by petition for rulemaking to the Secretary or other means. Absent such an attempt, they cannot seek to invoke the power of this Court as to their complaint that no such regulations have been adopted.

Therefore, the plaintiff [sic] have failed to show any irreparable harm from the actions sought to be enjoined, and no injunction should be granted. Indeed, they have wholly failed to state a claim upon which relief may be granted, and this complaint should be dismissed. Rule 12(b)(6) F.R. Civ. P.

II. DEFENDANT ASSISTANT SECRETARY OF COMMERCE FOR MARITIME AFFAIRS ACTED WITHIN THE STATUTORY LIMITS OF TITLE XI OF THE ACT WHEN APPROVING THE FINANCING ARRANGEMENT

Contrary to Plaintiff's [sic] contentions, no action pursuant to Title XI of the Act was taken which could be considered a "double finance" of the construction-differential subsidy portion of the construction price of the STUYVESANT. Further, and again contrary to plaintiffs' contentions, no action pursuant to Title XI of the Act was taken to insure or guarantee financing costs in an amount exceeding limits set by that statute. The statutory limits are 75% of actual or depreciated cost for vessels built with construction-differential subsidy, and 87½% of vessels *not* built with such subsidy (46 U.S.C. 1244(b)(2)).

The financial transaction approved by the Assistant Secretary on August 30, 1977, is summarized as follows:

TITLE XI Financing

Vessel Cost; to Purchaser: General Electric Credit Corporation (GECC)	$120,000,000
Maritime Administration found Cost paid:	$102,758,000
Less Construction-Differential Subsidy	—$ 27,205,293
Net Cost Paid	$ 75,553,107
87½% of Actual Cost Paid	$ 66,108,000
Less Insured Bonds Outstanding	— 28,845,000
Maximum Title XI Guaranteed Bonds	$ 37,263,000
Title XI Bonds being issued	$ 31,355,000
Excess Equity	$ 5,908,000

The following outline summarizes the break-down of the GECC vessel cost indicated above:

Components of Financing for
General Electric Credit Corporation

Vessel Cost:	$120,000,000	
Less Assumption of Outstanding Bonds Insured	— 28,845,000	(1st Tier Mortgage)
Under Title XI	91,155,000	
Less Bonds to be issued under	— 31,355,000	(2nd Tier Mortgage)
Title XI Guarantee	59,800,000	
Less Assumption of Polk Note to MarAd for Repayment of CDS	— 27,200,000	(3rd Tier Mortgage)
GECC Equity Investment	$ 32,600,000	

With respect to the $32,600,000, the money would be paid to Seatrain Shipbuilding Corp., which, in turn, would transfer that sum to its parent Seatrain Lines, Inc. for deposit into the Chase Manhattan Bank. Seatrain Corporation would issue to the General Electric Credit Corporation a guarantee of the charterhire performance by Queensway Tankers, Inc., which would be the bareboat charterer of the STUYVESANT to subcharter the vessel to SOHIO. The guarantee would be backed up by a letter of credit from the Chase Manhattan Bank (National Association) in the same amount of $32,600,000. The Chase Manhattan Bank would enjoy as security for the letter of credit, the full amount deposited by Seatrain Lines, Inc.

Insofar as concerns the $31,355,000 to be realized from issuance of the new bonds guaranteed under Title XI of the Act, $28,600,000 would be disbursed to The Chase Manhattan Bank (National Association) and Continental Illinois National Bank and Trust Company to pay off prior indebtedness which had been guaranteed by the Economic Development Administration. Thus, a potential liability to the Economic Development Administration will be erased. The remaining $2,755,000 to be realized from the new bonds would pay for the operating costs of the STUYVESANT to position it on the West Coast of the United States for performance of the charter to SOHIO in the transport of oil from the Trans-Alaskan Pipeline System.

The foregoing calculations conclusively establish (1) that the Secretary's obligations under Title XI of the Act do not exceed the limits set by law, and (2) that the construction-differential subsidy being repaid is *not* covered by the guarantee program under Title XI of the Act (as might have been lawfully authorized under 46 U.S.C. 1104(a)(3)). Further, the amount of the construction-differential subsidy being repaid was not in-

cluded in any calculation to arrive at the permissible dollar amounts entitled to coverage under Title XI of the Act. Therefore, there was no "double-financing" under Title XI, or any other provision of the Act, nor was the financing in excess of limits set by law. Accordingly, the plaintiffs can show no injury resulting from the entirely lawful transactions, and no injunctive relief is appropriate.

III. THE PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

It is a threshhold requirement upon all who seek to invoke the aid of the federal courts that they establish (1) that they have suffered an injury in fact as a result of the actions challenged and (2) that the injury in fact is related to the interests to be protected by the statute in question. *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1977); *Gifford-Hill and Co.* v. *FTC*, 523 F.2d 730, 731 and n.4 (D.C. Cir. 1975). The plaintiffs fail to meet either of these requirements.

A. *Plaintiffs Have Suffered No Injury In Fact*

The gravamen of the claims made by plaintiffs herein, Shell Oil Company, Alaska Bulk Carriers, Inc. and Trinidad Corporation, is that the entrance of the STUYVESANT into the Alaska oil trade will injure their competitive position in that trade. However, in their moving papers, plaintiffs disclose that in fact there is no such injury presently, or immediately in prospect.

Trinidad's tankers are presently under contract until June 1979 (affidavit of John J. Ervin, para. 3). Further, Trinidad has not alleged that subsequent to June 1979 any injury is reasonably in prospect, Ervin affidavit, para. 4) ("during the period from June 1979 through August 1980 Trinidad *may* fail to find employment. . . .").

Thus, Trinidad has shown no present or prospective injury in fact and lacks standing.

As to Alaska Bulk Carriers, it appears from plaintiffs' papers that the tanker fleet which they contend would be affected by the Secretary's actions herein, is presently under contract through 1980. To contend, as they do, that after 1980 their tankers will be in direct, lifelong competition with the STUYVESANT (affidavit of Larry F. Liddle, para. 17) is sheer speculation. Such speculation is insufficient to establish the injury in fact element of the standing requirement.

Shell Oil Company appears to contend that its injury consists of the absorption by the STUYVESANT of the only potential market for its vessels—the SOHIO subcharter (Shell complaint, para. 34). However, in order to establish that this absorption has injured Shell, it must be shown that Shell had sought to enter the market, that Shell has a vessel, or vessels, available to carry the tonnage, and that the actions of the Secretary or the intervenor-defendants resulted in the loss of this business.

None of these allegations appear in their complaints or supporting papers. Moreover, the *Request of SOHIO Petroleum Company for Denial of Request for Shell Oil Company for Review by the Secretary of Commerce of the Decision of the Maritime Subsidy Board*, dated September 15, 1977, and filed in the Administrative proceedings, indicates

> Shell is requesting for the term charter of its vessels charter rates that are at least 60-70% higher than market competitive rates for U.S. coastwise qualified vessels.

SOHIO request, page 3, para. 2 (copy attached for the convenience of the Court and parties). Thus, it would appear that far from the actions challenged in

this litigation being the cause of any injury to Shell, in fact, Shell's inability to secure employment for its vessels is a result of its failure to meet market prices.

In a recent case, *Public Citizen, et al.* v. *Lockheed Aircraft Corporation, et al.* No. 75-1958 (D.C. Cir. Aug. 25, 1977), the Court of Appeals had occasion to address the question of competitive injuries. The Court said

> An injury in fact need not be substantial to support Federal Court jurisdiction under this challenge to agency action; an identifiable trifle will suffice (Cit. omitted). The injury may be one which MDNA's members have already sustained or are immediately in danger of sustaining. *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). Nonetheless, the injury must be perceptible, concrete, specific, *U.S.* v. *SCRAP*, *supra at 689*, and real and immediate rather than conjectural or hypothetical. *California Bankers Association* v. *Shultz*, 416 U.S. 21, 69 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 108-10 (1969).

It is not necessary further to extend this argument and to burden the Court with extensive citations to establish this point. It is clear that plaintiffs have suffered no real concrete injury in fact.

Moreover, the affidavit of Russell F. Stryker, attached hereto, demonstrates that plaintiffs' fears of future competitive injury, even if adequately pleaded, are without substantial basis. Even with the STUYVESANT in the trade, there will be a major shortfall in available shipping capable of transporting Alaskan oil. Thus, when plaintiffs' vessels become available for charter, a market will exist in which they can compete.

As Plaintiffs have shown no injury in fact, immediate or prospective, they lack standing to maintain this action.

B. *Competitive Positions of Domestic Carriers are Not Within the Zone of Interests Protected by the Merchant Marine Act of 1936*

It has been held that the injury which forms the foundation for standing must be within the zone of interest protected by the statute whose violation forms the basis of a plaintiff's complaint. *Association of Data Processing Service Organizations, supra.; Gifford-Hill, supra; Barlow* v. *Collins*, 397 U.S. 159, 164-65 (1970). Recently the D.C. Circuit has observed that this test poses the single question: "whether the complaining party has stated an interest which is arguable from the face of the statute." *Tax Analysts and Advocates* v. *Blumenthal*, No. 75-1304 (D.C. Cir. June 15, 1977) Slip Op. at 21.

Should the Court determine, notwithstanding the argument set forth *supra*, part A, that plaintiffs have sufficient injury in fact to establish their standing, nonetheless their injury is not within the zone of interests protected by the Merchant Marine Act of 1936, as amended.

Congress and the courts have said that the purpose of the CDS program was to aid shipyards, not shipowners. H.R. Rep. No. 1073, 91st Cong., 2nd Sess. (1970), at page 30; *States Marine International Inc.* v. *Peterson*, 518 F.2d 1070 (D.C. Cir. 1975).

Moreover, Congress has, in the Jones Act (46 U.S.C. 883), extended competitive protection to the coastwise trade by limiting it to United States built and documented vessels. It is indisputable that the STUYVESANT is such a vessel. The Jones Act makes no mention of CDS.

At the completion of the transactions here at issue, the STUYVESANT will be in the same position as any other vessel built without CDS. Nothing in the Merchant Marine Act protects plaintiffs from competition from

such vessels. Thus, plaintiffs' competitive position is not within the zone of protected interests under the Act.

Therefore, plaintiffs lack standing and their complaints should be dismissed.

IV. THE ACTIONS OF THE SECRETARY SERVE THE PUBLIC INTEREST

The Secretary's actions complained of serve the public interest in several respects.

First, the STUYVESANT is needed to partially satisfy a deficit in available United States-flag vessels to transport the oil from the Trans-Alaskan Pipeline System to markets in the "lower 48" states. To the extent that vessel can help deliver a greater amount of needed oil to the American consumer, the public interest is well-served. Assuming, for the sake of argument, that plaintiffs are correct in saying that the presence of the STUYVESANT would tend to slightly lower shipping charges which might be demanded by plaintiffs when their vessels become available in future years, the lesser charges would reduce the cost of delivered oil and tend to lower prices for the consumer.

Second, the public interest would be adversely affected by forcing the STUYVESANT into lay-up. If the vessel is not gainfully employed, the risk appears that the outstanding bonds insured under Title XI of the Act will not be paid and the Secretary will redeem them. The new financial arrangements substantially increase the probability that the outstanding insured indebtedness will be repaid by the vessel's earnings. The new financial arrangements also give substantial grounds for concluding, as the Secretary has, that the additional indebtedness covered under Title XI of the Act will be repaid by the vessel's earnings. Prudent steps to avoid future demands upon Federal funds clearly is in the public interest.

Third, other Federal financial assistance, through the Economic Development Administration, also is supported and made more sound by the new financial arrangements. Immediately, over $28,000,000 in existing debt will be paid to banks and potential Federal exposure through guarantees issued by the Economic Development Administration will be erased. The remaining sums guaranteed by the Economic Development Administration will become more assured through several means: the escrowed $32,600,000 will bear interest and the total amount may be devoted to further retirement of guaranteed debt; and the sale of the STUYVESANT will remove continuing overhead costs and release more money for additional debt payment.

Fourth, the shipyard would have enhanced possibilities for remaining open and active. This serves two basic program objectives of the Secretary. With respect to the Economic Development Administration, the job training and employment of minorities in a severely depressed area will continue. With respect to the Maritime Administration, the availability of the working shipyard will contribute to fulfillment of a basic purpose of the Act, namely,

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States have . . .
>
> * * * *
>
> (e) . . . facilities for shipbuilding and ship repair. (46 U.S.C. 1101)

Plaintiffs have contended that the Secretary's determinations do not serve the public interest, and that enjoining any action under them is in the public interest. Thus, they seek to satisfy the last requirement of the test set forth in *Virginia Petroleum Jobbers* v. *FPC*, 259 F.2d 925 (D.C. Cir. 1958). However, their generalized contentions do not set forth any grounds for reversing

the Secretary's determinations and, as indicated by the foregoing, the public interest heavily favors the Secretary's actions herein.

Therefore, plaintiffs, having failed to establish any public interest ground for their position, are not entitled to the injunctive relief requested and their motions should be denied.

CONCLUSION

For all the foregoing reasons, plaintiffs' Motion for a Preliminary Injunction should be denied, and defendants' Motion to Dismiss should be granted.

Respectfully submitted,

/s/ Barbara Allen Babcock/RJS
BARBARA ALLEN BABCOCK
Assistant Attorney General

EARL J. SILBERT
United States Attorney

/s/ Barbara O'Malley/RJS
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Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF RUSSELL F. STRYKER

DISTRICT OF COLUMBIA)) ss.)

RUSSELL F. STRYKER being duly sworn, deposes and says that:

1. My name is Russell F. Stryker and I am employed by the Maritime Administration, an agency within the United States Department of Commerce. My official title is Assistant Administrator for Policy and Administration, which office I have held continuously since July 1, 1975. One of the units under my supervision is the Office of Policy and Plans which has been given the responsibility for analysis of tanker requirements for the United States and, in particular, the analysis of the tanker shipping requirements generated by the Trans-Alaskan Pipeline System. Prior to assuming my present office, I was Director, Office of Policy and Plans during the period January 2, 1974 - July 1, 1975. Prior to occupying this latter position, I was Staff Director, Transportation System Division in the Directorate for Transportation and Warehousing Policy, Office of the Deputy Assistant Secretary of Defense (Supply Maintenance and Services).

2. At my direction, and under my personal guidance, trained and experienced professional staff in the Office of Policy and Plans have analyzed the ocean-shipping requirements for domestic petroleum movements including,

but not limited to, the tanker requirements generated by the Trans-Alaskan Pipeline System. The information provided below summarizes the results of this analysis based on information currently available on expected pipeline throughput and data customarily collected by the Maritime Administration.

3. The Trans-Alaskan Pipeline System ocean shipping trades involve three distinct segments; first, trade between Alaska and Pacific Coast ports of the United States; second, trade between Alaska and transshipment points in the Republic of Panama or off-shore the Republic of Panama; and third, trade between such transshipment points through the Panama Canal to the Gulf Coast ports of the United States, and possibly Atlantic Coast ports of the United States. Controlling factors are: first, the physical limitations upon the size of vessels able to transit the Panama Canal; and, second, the transportation economies of larger vessels which dictate their use for long-haul trades if port facilities are available. In short, larger vessels are suitable for the trade between Alaska and transshipment points in the Republic of Panama or off-shore the Republic of Panama and are suitable for trade between Alaska and West Coast ports of the United States and smaller vessels are required for the trade transiting the Panama Canal. Although physical characteristics other than size were considered, the deadweight tonnage boundry between large and small tankers is approximately 50,000 DWT.

4. The calculation of tanker requirements depends on assumptions, of throughput of the Trans-Alaskan Pipeline System, consumption on the West Coast of the United States, and the availability of proposed pipelines to move oil from the West Coast of the United States to the central part of the United States. The following table indicates the assumed Trans-Alaskan Pipeline System throughput, the West Coast consumption and the remainder required to be transported to the Gulf (or Atlantic) Coast of the United States:

BASIC ASSUMPTIONS

Year	Trans-Alaskan Pipeline System Throughput (Bbl/day)	West Coast Consumption (Bbl/day)	Surplus Shipped to Gulf Coast (Bbl/day)
1978.3	1,350,000	675,000	675,000
1980.1	1,500,000	750,000	750,000

It is assumed that the West Coast market may not be able to absorb more than approximately fifty percent (50%) of the Trans-Alaskan Pipeline System throughput and that proposed pipelines to move the surplus from the West Coast to the United States Gulf Coast or Middle West are not available in this period. This generates a corresponding requirement for ocean tanker shipment between Alaska and the Republic of Panama or off-shore the Republic of Panama for shipment through the Panama Canal to the United States Gulf Coast.

5. There are sufficient small tankers available to satisfy demand for transportation of Alaskan oil from the Republic of Panama or off-shore the Republic of Panama through the Panama Canal to the United States Gulf Coast. The following table shows these requirements and the available supply of small tonnage built with and without construction-differential subsidy:

SMALL TANKER DEMAND/SUPPLY BALANCE

		Supply	
Year	Demand (000 DWT)	Non-CDS (000 DWT)	CDS (000 DWT)
1978.2	1,188	1,227	376
1980.1	1,320	1,227	376

6. The large tanker requirements for use in the trade from Alaska to the West Coast ports of the United States

and the trade between Alaska and the Republic of Panama or off-shore the Republic of Panama are as follows:

LARGE TANKER DEMAND

Year	West Coast (000 DWT)	Panama (000 DWT)	Total Demand (000 DWT)
1978.3	1,244	3,008	4,252
1980.1	1,382	3,336	4,718

The supply estimates for these large tankers show a deficit in vessels *not* built with construction-differential subsidy, and this deficit can only be fulfilled by other United States-flag vessels drawn from the construction-differential subsidy fleet:

LARGE TANKER DEMAND/SUPPLY BALANCE

		Supply	
Year	Demand (000 DWT)	Non-CDS (000 DWT)	CDS (000 DWT)
1978.3	4,252	3,758	3,320
1980.1	4,718	4,548	3,376

7. The single and central conclusion from this analysis is that the deficit in available United States-flag vessels built without construction-differential subsidy in the trade between Alaska and the Republic of Panama or off-shore the Republic of Panama over the next three years is expected to be approximately five hundred thousand deadweight tons (500,000 DWT). The entry of the STUYVESANT into this trade will *not* erase that deficit completely, but will fulfill approximately one-half of said deficit.

/s/ Russell F. Stryker
RUSSELL F. STRYKER

Subscribed to before me this 28th day of September 1977.

/s/ Anne M. Manning
Notary Public

My Commission expires:

April 14, 1979

[SEAL]

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF DENNIS BURGESS

Attached hereto is the original of the affidavit of Dennis Burgess executed September 28, 1977.

Respectfully submitted,

WILLIAMS & CONNOLLY

By /s/ John W. Vardaman, Jr.
JOHN W. VARDAMAN, JR.

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AFFIDAVIT OF DENNIS BURGESS

STATE OF OHIO

COUNTY OF CUYAHOGA

I am Dennis Burgess and my position at Standard Oil of Ohio is Manager, Marine Chartering. I am personally familiar with the facts contained in the request of Standard Oil of Ohio for denial of the request by Shell Oil Company for review by the Secretary of Commerce of the decision of the Maritime Subsidy Board dated and filed September 15, 1977 and know the same to be true and accurate.

/s/ Dennis Burgess
DENNIS BURGESS

Subscribed and sworn to before me this 28th day of September, 1977

/s/ Kathleen Doyle
KATHLEEN DOYLE
Notary Public
State of Ohio
Cuya. Cty.

My Commission Expires May 3, 1981

[SEAL]

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

POLK TANKER CORPORATION
REPAYMENT OF CONSTRUCTION-DIFFERENTIAL SUBSIDY
OPERATION OF SUBSIDIZED VESSEL IN JONES ACT TRADE

REQUEST OF SOHIO PETROLEUM COMPANY FOR DENIAL OF REQUEST BY SHELL OIL COMPANY FOR REVIEW BY THE SECRETARY OF COMMERCE OF THE DECISION OF THE MARITIME SUBSIDY BOARD

WILLIAM J. WEBB
Attorney for Sohio
Petroleum Company
1723 Midland Building
Cleveland, Ohio 44115

Dated: September 15, 1977

I. THE DECISION OF THE BOARD

The subject of this Request for Review by the Secretary of Commerce is the decision of the Maritime Subsidy Board (the "Board"), dated August 30, 1977, authorizing (i) the repayment of the construction-differential subsidy ("CDS") paid by the Board to Polk Tanker

Corporation ("Polk") and its parent corporation, Seatrain Shipbuilding Corporation ("Seatrain") to aid in the construction of the T.T. STUYVESANT (the "Vessel") by delivery of a 20-year promissory note to the United States secured by a third preferred ship mortgage, and (ii) the immediate release of all trading restrictions pursuant to Title V, Merchant Marine Act, 1936, as amended (the "Act") thereby permitting the Vessel to engage in the domestic trade of the United States in direct competition with vessels constructed without the aid of subsidy.

II. THE INTEREST OF SOHIO PETROLEUM COMPANY

Sohio Petroleum Company ("Sohio") has agreed to time charter the T.T. STUYVESANT for a period of three (3) years commencing in September, 1977, providing the Vessel is eligible for U.S. coastwise trade during this period. The Vessel will be primarily utilized by Sohio to transport Alaskan North Slope crude oil from Valdez, Alaska, to other states. There is a shortage of readily available U.S. coastwise qualified vessels, and the need for such vessels will grow substantially when Pump Station Eight on the Trans Alaska Pipeline System ("TAPS") is recommissioned within the expected six to seven months. The utilizatioan of the T.T. STUYVESANT by Sohio will play an important role in Sohio's plans to transport North Slope crude oil from Alaska to other states and is necessary to insure the success of the TAPS operation.

III. GROUNDS FOR DENIAL OF THE REQUEST BY SHELL OIL COMPANY FOR REVIEW

Sohio believes that Secretary of Commerce should deny review of the Decision of the Maritime Subsidy Board for the following reasons:

1. Shell Oil Company ("Shell") failed to make its vessels available for time charter until well after Sohio had agreed to time charter the T.T. STUYVESANT.

Periodically during the past twelve months, Sohio has negotiated charters on a growing number of tankers for the Alaskan trade. This activity has been common knowledge within the industry, and Sohio has been approached by many owners of potentially available tonnage.

In September of 1976, Sohio was not chartering additional ships because of uncertainties at that time in the exact timing of the completion of TAPS and the completion of a West Coast to Mid-Continent pipeline system; both major factors in the requirements for tankers in the Alaskan Oil movement.

In the Spring of 1977, the timely completion of TAPS became a reality and the uncertainties associated with the timing of a West Coast to Mid-Continent pipeline system increased. Discussions with Shell at that time indicated an unwillingness on Shell's part to offer their ships on term charters. Sohio's negotiations for the T.T. STUYVESANT became public knowledge in May, 1977, and elicited no comments from Shell. In fact, Shell did not make an offering of its vessels until after the explosion and fire at Pump Station Eight.

2. Shell is requesting for the term charter of its vessels charter rates that are at least 60-70% higher than market competative [sic] rates for U.S. coastwise qualified vessels. Sohio believes that it would be unfair to review Shell's request when Shell has previously failed to make its vessels available and is doing so now only at charter rates that could be considered unconscionable.

IV. CONCLUSION

For the reasons stated above, Sohio respectfully requests that the Secretary deny the request of Shell Oil Company for review.

Respectfully submitted,

/s/ William J. Webb
WILLIAM J. WEBB
Attorney for Sohio
Petroleum Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing Request for Denial by the Secretary of Commerce to be served by hand delivery upon the Secretary of the Maritime Subsidy Board and upon H. Clayton Cook, Jr., Esq., attorney for Shell Oil Company.

Dated at Cleveland, Ohio, this 15th day of September, 1977.

/s/ William J. Webb
WILLIAM J. WEBB
Attorney for Sohio
Petroleum Company

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES S. DAWSON, JR.

District of Columbia)
) ss.:
)

JAMES S. DAWSON, JR., being duly sworn, deposes and says that:

1. My name is James S. Dawson, Jr. and I am employed in the Maritime Administration, an agency within the United States Department of Commerce. My official title is Secretary of the Maritime Administration and the Maritime Subsidy Board. I have served in this capacity since 1961. Among my other duties outlined in Maritime Administrative Order No. 12-1, is the responsibility to act as custodian of the records of official actions of the Maritime Subsidy Board and the Assistant Secretary for Maritime Affairs, who is the chief executive officer of the Maritime Administration.

2. Upon review of the records of the Maritime Subsidy Board, as well as on personal knowledge and belief, only five requests have been received by the Maritime Subsidy Board or its predecessor agencies from shipowners owning vessels built with construction-differential subsidy pursuant to Title V, the Merchant Marine Act, 1936, as amended (46 U.S.C. 1151-1161), for total repayment of said subsidy. Each of the said requests is identified below:

A. Grace Line, Incorporated requested the privilege of total repayment of construction-differential subsidy on the

SSs SANTA ELIANA and LEONOR in 1964. Repayment was agreed to by the Maritime Subsidy Board and the shipowner but only after concurrence was obtained from the Comptroller General of the United States in his Decision B-155039 (44 Comp. Gen. 180, September 30, 1964).

B. Atlas Marine Company requested the privilege of repayment of construction-differential subsidy, at interest, on the SS AMERICAN HERITAGE in 1976. However, the shipowners only sought repayment privilege in the event that the Virgin Islands trade became domestic trade at some future date. The Maritime Subsidy Board in December 1976 agreed to the request and added an additional condition; namely, that the vessel would not be permitted to enter the Alaska oil trade.

C. Aquarius Marine Company requested the privilege of repayment of construction-differential subsidy, at inteerst, on the SS GOLDEN MONARCH in 1977. The terms were the same as in "B" above and approval was granted in March 1977.

D. Wilmington Trust Company requested the privilege of repayment of construction-differential subsidy on two liquid natural gas vessels during 1977. The vessels are being built and are not yet delivered for service in the LNG trade between Indonesia and Japan. Approval was granted in August 1977 and the Maritime Subsidy Board required interest payment.

E. Polk Tanker Corp. requested the privilege of repayment of construction-differential subsidy on the STUYVESANT in 1977. The Maritime Subsidy Board agreed to the repayment by action taken August 30, 1977. This action is the subject of the instant suit.

3. Upon review of the records of the Maritime Subsidy Board, as well as personal knowledge and belief, no

other requests for total repayment of construction-differential subsidy have been presented to the Maritime Subsidy Board or its predecessor agencies, and, therefore, no denials of such requests have, or could have, occurred.

4. The requests identified in paragraph 2 above, were not published in the *Federal Register* or otherwise, either to notify members of the public or to invite comment on said requests. The records of the Maritime Subsidy Board and the Maritime Administration contain no regulations requiring such publication, nor are any required by the Merchant Marine Act, 1936, as amended.

5. Upon review of the records of the Maritime Subsidy Board and the Maritime Administration, as well as personal knowledge and belief, literally scores of amendments to construction-differential subsidy contracts have been executed over the years. Requests from shipowners leading to said amendments to construction-differential subsidy contracts have not been published in the *Federal Register* or otherwise, either to notify the public or to invite comments by interested persons. No regulations have been issued by the Maritime Subsidy Board or Maritime Administration governing such requests, nor are any required by the Merchant Marine Act, 1936, as amended.

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.

Subscribed and sworn to before me this 28th day of September 1977.

/s/ Joan A. Bryan
NOTARY PUBLIC

My Commission Expires July 31, 1979

(SEAL)

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

[Filed Sep. 30, 1977, James F. Davey, Clerk]

ORDER

In accord with the accompanying Findings of Fact and Conclusions of Law entered in the above-captioned action on September 30, 1977,

IT IS HEREBY ORDERED

1. The Temporary Restraining Orders entered in the above-captioned action on September 22, 1977 are dissolved and the Findings of Fact and Conclusions of Law contained therein are set aside;

2. The plaintiffs' motions for preliminary injunction are DENIED;

3. The defendant-intervenors' motion to dismiss the complaint is DENIED WITHOUT PREJUDICE.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

September 30, 1977-1:25 p.m.

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

[Filed Sep. 30, 1977, James F. Davey, Clerk]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on plaintiffs' Motions for Preliminary Injunction, upon consideration of the memoranda and affidavits in support thereof and in opposition thereto, the Court, having heard extensive argument on September 29, 1977, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. These are consolidated actions in which the plaintiffs, Shell Oil Company ("Shell"), Alaska Bulk Carriers, Inc. ("Alaska") and Trinidad Corporation ("Trinidad") challenge a series of actions by the Defendants Juanita M. Kreps, Secretary of Commerce; the Maritime Administration; Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, and the three members of the Maritime Subsidy Board (hereinafter Secretary and/or designees). Seatrain Shipbuilding Corporation and Polk Tanker Corporation intervened as defendants.

2. On August 30, 1977, the Secretary and her designees took a series of actions which would permit the STUYVESANT, a tanker constructed for Intervenor Polk by Intervenor Seatrain Shipbuilding, to be relieved of restrictions contained in construction-differential subsidy contracts (CDS) with the Secretary which restricted the vessel's operation in the domestic trade.

3. The plaintiffs Shell, Alaska, and Trinidad are each either owners or charterers of tankers in the domestic trade. Plaintiff Trinidad owns five tankers outright and through a subsidiary has three others under charter. However, these vessels are all under charter until June 1979. Alaska Bulk Carriers has three tankers, all of which are under charter through 1980. Shell is the purchaser under a construction contract of two tankers scheduled for delivery in January 1978 and September 1978 respectively.

4. The construction of the STUYVESANT was financed in part by a $27.2 million construction-differential subsidy paid pursuant to Title V of the Merchant Marine Act, 1936, as amended 46 U.S.C. Section 1151 *et seq.*

5. By letter of August 25, 1977, Polk Tanker requested that the Secretary and her designees amend the CDS contract between them to permit Polk to repay the subsidy and obtain release from the contractual restrictions imposed pursuant to § 506 of the Merchant Marine Act, 1936, on operation in the domestic trade. Such action by the Secretary would permit the STUYVESANT to be time chartered to Standard Oil Company of Ohio (SOHIO) for use in the United States domestic trade to transport oil from Alaska and to be sold to United States Trust Company (USTC) as trustee for the equity owner, General Electric Credit Corporation (GECC).

6. On August 30, 1977, the Federal defendants granted Polk's request and approved a series of transactions relating to the sale, charter and use of the STUYVESANT in the domestic trade. Letters to Polk describing the actions taken August 30, 1977 were released August 31, 1977.

7. The closing on the transactions approved by the August 31, 1977 letters was scheduled for September 23, 1977.

8. On September 22, 1977, plaintiffs filed two lawsuits seeking temporary and permanent injunctive relief, challenging the actions taken by the Secretary and her designees on the grounds:

(1) The Secretary was without lawful authority to amend the CDS contract to permit repayment of the subsidy and removal of the trade restrictions;

(2) The Secretary was without lawful authority to accept repayment in the form of a promissory note payable in equal semi-annual installments over 20 years.

(3) The Secretary took her actions in an arbitrary and capricious manner, violative of due process.

Plaintiffs alleged they will suffer irreparable injury from these actions.

9. On September 22, 1977, the Court granted temporary restraining orders that enjoined the effectiveness of the Secretary's August 30, actions.

10. On September 29, this Court held a hearing on the plaintiffs' Motions for Preliminary Injunction.

11. The closing of the transaction involved in this case, scheduled for September 23 is now scheduled for September 30. That is a critical date for the parties.

12. Under the terms of the SOHIO Charter, Polk must deliver the vessel in Valdez, Alaska no later than September 30, 1977. The Court was advised that SOHIO could wait only until October 8, 1977 to commence loading the vessel. The equity purchaser, GECC, and the purchasers of the bonds in the amount of $31,355,000, essential to the sales completion, are committed only through September 30, 1977. The restructuring of the transaction by another bond offering could not be accomplished between September 30 and October 8, 1977. The failure to restructure the transaction would result in substantial and irreparable injury to Polk and Seatrain.

CONCLUSIONS OF LAW

1. The plaintiffs have not sustained their burden to establish immediate and irreparable injury. Shell will suffer no irreparable injury until January of 1978, at the earliest. Alaska Bulk and Trinidad will suffer no irreparable injury until 1979, at the earliest. The plaintiffs failed to show that they will sustain any injury that cannot be corrected by the Court upon full consideration of this action on the merits.

2. The plaintiffs have not, upon the record before the Court at this time, proved a likelihood of success on the merits.

3. Granting preliminary injunctive relief at this time would subject the intervenors, and perhaps other parties not before the Court, to substantial and irreparable injury.

4. The actions of the Government officials charged with the responsibility of administering the CDS program on behalf of the public are entitled at this time to a presumption of regularity. On balance, after consideration of all of the equities, and based upon the record before the Court at this time, the Court finds that the public interest favors the denial of injunctive relief.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

September 30, 1977 1:25 p.m.

OPINION OF THE COMPTROLLER GENERAL

B-155039, 44 Comp. Gen. ——, September 30, 1964

[As reprinted in the Pike-Fisher looseleaf service. Editor's headnote omitted in printing.]

The Honorable
The Secretary of Commerce

Dear Mr. Secretary:

Reference is made to your letter of August 21, 1964, requesting to be advised whether we concur in the view of your Department that the Maritime Subsidy Board has the legal authority to amend construction-differential subsidy contracts Nos. FMB-89 and FMB-90 with the Grace Line, Incorporated, covering the S.S. SANTA ELIANA and the S.S. SANTA LEONOR, so as to free the vessels from the restrictive provisions incorporated therein pursuant to Section 506, Merchant Marine Act, 1936, as amended. We understand that the continuation of the contract provisions required by Sections 503 and 802 involving documentation under the laws of the United States and the Government's requisitioning authority are not involved.

It is reported that in 1958 the Federal Maritime Board granted to Grace Line, Incorporated, construction-differential subsidy aid for the conversion of the two vessels from cargo to container vessels; that certain difficulties have caused the Grace Line to conclude that these vessels cannot be operated successfully as originally intended; that the Grace Line proposes to sell these vessels to a domestic operator for operation in the domestic trade of the United States; and that the Grace Line has requested the amendment to the contracts to remove the Section 506 (Merchant Marine Act, 1936, as amended)

provisions requiring exclusive foreign-trade operation as therein provided. If such permission is granted the Grace Line will refund to the Government the unamortized subsidy paid by the Government in connection with the conversion of the vessels to container vessels.

Section 506, as originally enacted in 1936 (49 Stat. 1999), read as follows:

> "SEC. 506. *It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade,* or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an inland possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life.* If an emergency arises which, in the opinion of the Commission, warrants the *temporary* transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, that no operating-differential subsidy shall be paid during the duration of such temporary or emergency period, and such period *shall not exceed three months.* Every

contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year." (Underlining added).

In the 1958 amendments to the Merchant Marine Act, 1936 (Public Law 705, 75th Congress, 3d Session), Section 506 was completely rewritten and as modified by Public Law 863 (1959) to add the words "the State of Hawaii" and Public Law 86-518 (1960) to extend the "economic life" of vessels from 20 to 25 years (except for liquid bulk carriers), reads as follows:

"SEC. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission

that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period."

In explaining the 1958 amendment, the House Committee on Merchant Marine and Fisheries in its Report No. 2168 stated:

"Section 506 deals with the services upon which vessels which have been built with a construction-differential subsidy may operate and provides for the repayment of proportions of the subsidy in case the vessel is used otherwise. The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade, and, if the vessel is operated in the domestic trade on certain definitely stated services, to repay certain proportions of the subsidy. If the vessel is used, with the consent of the Com-

mission, in the domestic trade in services other than those enumerated, *the obligations of the owner to repay part of the subsidy are clearly defined.*

"No fundamental change in the original purpose of the section has been effected." (Underscoring supplied.)

The Committee on Commerce in reporting on the amended language of Section 506, stated (S. Report No. 1618-75th Congress, 3d Session):

"Section 506 has been entirely rewritten *to remove ambiguities and confusion.*

"This section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission other than exclusively in foreign trade or in other enumerated voyages to foreign ports which may include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These provisions are definite. The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the construction-differential subsidy. *It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months.*

"As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-

differential subsidy for any service in which the vessel is engaged which includes domestic ports enroute to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period.

"It is believed that the section, as rewritten, will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic." (Underscoring supplied.)

Section 506 was further amended by Public Law 88-225 (1963) to add the following contract amendment provision:

"Provisions in such contracts affecting vessels covered by this Act providing for refund of construction-differential subsidy for domestic operations under Section 506 of the Merchant Marine Act, 1936, and costs of national defense features for commercial use shall be amended so that for such refund payments made for the period after December 31, 1959, the base upon which such refund payments are computed annually thereafter shall be the undepreciated amount of subsidy or the national defense feature, as the case may be, as at December 31, 1959, divided by the years of life of the vessels as provided under this Act, remaining after December 31, 1959."

The effect of this amendment was to provide the same formula for refund of subsidy under Section 506 that had

previously been provided for under other sections of the 1936 Act.

During the hearings before the Merchant Marine and Fisheries Subcommittee of the Senate Commerce Committee and the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee on identical bills S. 1172 and HR 6813 (which became Public Law 88-225) the Maritime Administrator, Mr. Alexander, stated (p. 59 of Senate Hearing and p. 118 of the House Hearings):

> "We also believe that the obligation to repay construction-differential subsidy for operation in domestic trade was intended to be, and should be, terminated at the end of the economic lives of the vessels."

As introduced S. 1172 and HR 6813 contained a Section 2 which would have expressly provided for the termination of the obligation to repay construction-differential subsidy for operation in domestic trade at the end of the vessel's statutory life. On August 30, 1963, the Senate Commerce Committee favorably reported S. 1172 to the Senate with an amendment that would delete Section 2 of the bill. The Senate agreed to this amendment and on October 7, 1963, enacted the bill so amended. In the debate on the bill Senator Magnuson gave the following explanation of Committee amendments (Congressional Record, p. 17797):

> "Let me say further that the report language on page 3 as to the elimination of Section 2 of the bill has reference to the fact that the Committee understands that the formula prescribed in Section I of the bill would by its application complete the statutory life cycle of the vessel and there would be no more refunds of construction subsidy for domestic operation after that cycle is completed."

In a report dated December 10, 1963, to the House Merchant Marine and Fisheries Committee on S. 1172 as it passed the Senate, the Department of Commerce recited the foregoing legislative history of S. 1172 in the Senate. On December 12, 1963, the House Marine and Fisheries Committee favorably reported S. 1172 to the House without mentioning the legislative history of the bill in the Senate but included the Department of Commerce report of December 10, 1963, to the Committee on S. 1172 as it passed the Senate. The House passed the bill on December 17, 1963.

The foregoing portion of the legislative history of Section 506 demonstrates that the Congress intended to clarify the domestic services which were authorized and to remove any question of authority for temporary periods of domestic operations, all of which would require repayment of subsidy. Furthermore, it appears clear that the requirement for repayment of construction-differential subsidy for domestic operation would cease when a vessel reaches the end of its statutory life period. The question then arises whether an owner may accelerate his vessel's release from the Section 506 restrictions by repayment of the unamortized balance of the Government's subsidy contribution.

Under the law an American operator in the domestic service is required to build his ship in an American shipyard and is required to pay the full domestic price of his ship. An operator, aided with a Title V construction-differential subsidy, secures his ship at a cost equivalent to a foreign price (domestic price less the subsidy granted by the Government) and, as a result thereof the operator is required by Section 506 to, in effect, pay the domestic price if the ship is operated in the domestic trade. This is accomplished by a repayment to the Government of the subsidy applicable to that proportion of the vessel's statutory life during which it is operated in the domestic

trades. Upon the basis of the rationale for the repayment of subsidy, it appears that if the Government receives the full benefit of its subsidy by the owner's operations in the foreign trade and the compliance with the other construction-differential subsidy contract obligations for the statutory life of the vessel, or if, in the case of a vessel which has not reached the end of its statutory life, the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel; that is, he should not be required to make further repayments and should not be bound to operate the vessel exclusively in foreign trade. This conclusion appears amply supported by the above-quoted portions of Senate Report No. 1618, 75th Congress, 3d Session, and that the repayment of unamortized subsidy will protect the interests of the Government and those of the carriers, both foreign and domestic.

In view of the foregoing, we concur in the view of your Department that the Maritime Subsidy Board has the legal authority to amend the two contracts involved to remove therefrom the Section 506 provisions as requested by Grace Line, Incorporated, upon repayment to the Government of the unamortized construction-differential subsidy paid by the Government for the reconversion of the two vessels.

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF CHARLES E. DUNAGAN

District of Columbia: SS

I, Charles E. Dunagan, being duly sworn, depose and say,

1. My name is Charles E. Dunagan. I am Manager, Marine Affreightment, Transportation and Distribution Department, Shell Oil Company, Two Shell Plaza, Houston, Texas.

2. My employment with Shell involves the formulation and implementation of corporate plans necessary to provide marine transportation for Shell Oil Company.

3. In the course of my employment, I have been personally involved in the decision to build two unsubsidized 188,500 deadweight ton ("dwt") oil tankers for the Alaskan oil trade and in negotiations to find employment for these two vessels.

4. On February 28, 1975 Shell entered into a contract with National Steel and Shipbuilding Company, San Diego, California ("NASSCO") for the construction of two 188,500 dwt San Diego class tankers. Prior to executing this contract, Shell personnel conducted an exhaustive study of tanker supply and demand in the Alaskan oil trade. This study demonstrated that between 1977 and 1982, projected Alaskan oil production

on the North Slope would create a demand for transportation which could not be met by the unsubsidized tanker fleet which would be available.

5. The Board of Directors of Shell Oil Company, on February 27, 1975, adopted a resolution approving the NASSCO contract. The preamble to this resolution stated "[The Company's feasibility] studies assume that the company will need transportation of approximately 180,000 B/D of North Slope Crude for its West Coast refineries; but even if that total need does not materialize, the forecast of tanker rates for other Alaskan vessels is high relative to the freighting level of these tankers, which maximizes the probability of their satisfactory alternate employment." A true and correct copy of the text of the February 27, 1975 preamble and resolution is attached hereto as Exhibit A.

6. The two Shell vessels can be profitably used only in the Alaskan oil trade. There is no demand for oil tankers of 188,500 dwt in the domestic trade except in the Alaskan oil trade. The vessels can not be used economically in the foreign trade because they were not built with government subsidy.

7. Based on present data as to projected Alaskan crude production, projected West Coast crude consumption, and unsubsidized tanker vessels now in service and under construction, the demand for oil tanker tonnage in the Alaskan oil trade for the years 1977 to 1980, inclusive, should approximately equal supply.

8. I have reviewed the Affidavit of Russel F. Stryker, filed in this action on September 30, 1977. The affidavit predicts that there will be a deficit of 500,000 dwt in available United States-flag vessels built without construction-differential subsidy in the trade between Alaska and the Panama Canal over the next three years.

9. The predicted deficit is based on assumptions by Mr. Stryker as to West Coast crude surplus which are inconsistent with official estimates of the Federal Energy Administration and the President of the United States. The Stryker affidavit, at ¶ 7, predicts a West Coast crude surplus of 675,000 barrels per day ("Bbl/d") in 1978.3 and 750,000 Bbl/d in 1980.1. By contrast, a Commerce Department publication of October 1976 entitled "The U.S.-Flag Tanker Fleet and Domestic Tanker Requirements" predicts, at page 6, that West Coast surplus in 1978.2 will be 500,000 Bbl/d and in 1980.1 will be 650,000 Bbl/d. These predictions were supplied to the Department of Commerce by the Federal Energy Administration ("FEA"). More recent FEA data confirms the 1976 predictions. A report entitled "Equitable Sharing of North Slope Crude Oil," published by FEA in April, 1977, predicts, at page 13, that West Coast surplus in 1978 and 1979 will be 400,000-500,000 Bbl/d and 385,000-485,000 Bbl/d respectively. This report is attached hereto as Exhibit B. In his April 15, 1977, "Report to Congress on the Pricing of Alaskan North Slope Crude Oil" President Carter, at page 25, predicts West Coast surplus to be 400,000 Bbl/d in 1979. This report is attached hereto as Exhibit C. The following chart summarizes this data:

Source	Date	West Coast Consumption (Bbl/d)	Surplus Shipped to Gulf Coast (Bbl/d)
Stryker	1978.3	675,000	675,000
	1980.1	750,000	750,000
FEA/Commerce 1976	1978.2	850,000	500,000
	1980.1	850,000	650,000
FEA 1977	1978	950,000-850,000	400,000-500,000
	1979	955,000-855,000	385,000-485,000
President 1977	1979	800,000	400,000

10. Inflation of the surplus to be shipped to the Panama Canal inflates the demand for tonnage since the trip

from Valdez, Alaska to the Canal is approximately twice as long as the trip to California. If the tonnage demand figures in the Stryker affidavit for the West Coast and Panama Canal shown in paragraph 6 are each multiplied by a fraction composed of the 1976 FEA/Commerce crude volume figures as numerator and the Stryker crude volume figures as denominator, the result is the demand for tankers, based on the Stryker formula for converting crude volume to tonnage and on the FEA surplus instead of the Stryker surplus. This result shows that demand is virtually equal to unsubsidized supply. This is illustrated by the following computations:

1. 1978.3
Demand (000 dwt)

West Coast:	$1{,}244 \times \frac{850{,}000}{675{,}000}$	= 1,567
Panama Canal:	$3{,}008 \times \frac{500{,}000}{675{,}000}$	= 2,228
Total:		3,795
Tonnage Supply (non CDS) (000 dwt): (includes Shell vessels)		3,758
Surplus Demand (000 dwt):		37

2. 1980.1
Demand (000 dwt):

West Coast:	$1{,}382 \times \frac{850{,}000}{750{,}000}$	= 1,566
Panama Canal:	$3{,}336 \times \frac{650{,}000}{750{,}000}$	= 2,891
Total:		4,457
Tonnage Supply (000 dwt): (non CDS) (includes Shell vessels)		4,548
Surplus Demand (000 dwt)		—91

11. Based on projected vessel construction, existing vessels, existing charters, and projected crude production, all Alaskan North Slope crude has transportation through

1980, except for a portion of the crude production owned by SOHIO. Atlantic Richfield Company ("ARCO") and Exxon Corporation ("Exxon"), each of which owns approximately 20 percent of Alaskan crude, can basically meet their respective needs for transportation during the next three to five years through the use of unsubsidized vessels currently owned, under construction, or chartered. SOHIO, however, which owns the remaining 60 percent of Alaskan crude, does not have sufficient transportation to move its entire production over the next three to five years. At least one vessel of the Shell size must be added during the next three to five years if all the SOHIO crude is to be moved.

12. Shell has offered its vessels for sale and/or charter to SOHIO, ARCO and Exxon. Offers to begin negotiations were made to each of these firms in the fall of 1976, January, 1977, and in the fall of 1976, respectively. On August 4, 1977, a firm offer was made to SOHIO to charter the two vessels. On August 5, 1977, a firm offer was made to SOHIO to charter one vessel for two or three years. The charter rate offered was $9.00 dwt/month for the first year of a three-year charter and $9.50 dwt/month for the first year of a two-year charter, each with yearly escalations thereafter.

13. The rate offered on August 5 is considerably less than rates paid by SOHIO, ARCO and Exxon to charter other unsubsidized vessels in the Alaskan oil trade. Charter rates in this trade range as high as $15.00 dwt/month. A graph illustrating existing charter rates is attached hereto as Exhibit D.

14. The rate of return earned by Shell from a charter at $9.50 dwt/month is well below that earned from other existing time charters of unsubsidized vessels. A graph illustrating existing rates of return is attached hereto as Exhibit E. On this scatter diagram, the return

on capital ranges from about 6% to somewhat more than 30%. The NASSCO 91s chartered to SOHIO are about 12% return on capital, the PRINCE WILLIAM SOUND also charter to SOHIO is about 13%, the AMERICAN SUN is fixed to EXXON for a return of about 26% and the SHELL offer to SOHIO is in the 13% range or on the lower side of the 6 to 30% spread.

15. Further affiant sayeth not.

/s/ Charles E. Dunagan
CHARLES E. DUNAGAN

Subscribed before me this 12th day of October, 1977.

/s/ [Illegible]
Notary Public

My Commission expires:
[Illegible]

ACQUISITION OF TANKERS FOR TRANSPORTATION OF ALASKAN CRUDE OIL

The Chairman referred to previous discussions with the Board of the Company's prospective acquisition of the services of two tankers to transport crude oil from Valdez, Alaska to West Coast refineries; and he called on Mr. St. Clair to report on current developments.

Mr. St. Clair said that the Company's feasibility studies indicate that the most economical tankers for the Alaskan crude oil trade are those of 150,000/200,000 DWT cargo capacity, and that such tankers ordered now for new building can be delivered coincident with the estimated opening of the Alyeska Pipeline in late 1977 or early 1978. Those studies assume that the Company will need transportation of approximately 180,000 B/D of North Slope Crude for its West Coast refineries; but even if that total need does not materialize, the forecast of tanker rates for other Alaskan vessels is high relative to the freighting level of these tankers, which maximizes the probability of their satisfactory alternate employment.

Based on these considerations, the Company has negotiated with various shipbuilders; has selected, as the best prospective builder, National Steel and Shipbuilding Company at San Diego; and has developed a contract with that Company, captioned "Contract for Construction of Two (2) SAN DIEGO Class 190,000 DWT Tankers for Shell Oil Company", and dated February 28, 1975. Presenting that Contract to the meeting, Mr. St. Clair advised that it has been carefully reviewed by the Company's Transportation and Supplies, Purchasing and General Services and Legal Departments, and is deemed

by them to be, in both substance and form, satisfactory to the Company.

The base prices of the tankers, as specified in the Contract, are $68,840,000 and $65,933,000, respectively. Each of those prices is subject to upward adjustment by approximately $2,700,000 for modifications of the plans and specifications yet to be requested by the Company, and also to escalation with the Contractor's costs of labor, steel and other materials. Allowing an additional $6,000,000 for each tanker for construction supervision, initial stores and contingencies, the estimated delivered costs of the tankers are $90,400,000 and $87,500,000, respectively.

Since the tankers will have to be documented under United States laws for its coastwise trade, each of them will eventually be delivered to and owned by a party nominated by the Company, which will be a United States citizen under those laws, and will commit the tanker to Shell's service under an appropriate charter party. The various available options for financing these tankers are under study to determine which will be most advantageous to the Company.

After Mr. St. Clair concluded his report with the recommendation that the proposed Contract for acquisition of the tankers be authorized, the Chairman endorsed that recommendation; and the ensuing discussion eventuated in unanimous adoption of the following resolution:

> RESOLVED, That the Company is hereby authorized to enter into—and any Vice President of the Company is hereby authorized to execute and deliver, in the Company's name and behalf—a Contract with National Steel and Shipbuilding Company for its construction for the Company of two SAN DIEGO Class tankers of approximately 190,000 DWT

> each, in substantially the form of such Contract presented to this meeting, with any modifications thereof having the approval of the Company's executing Vice President (whose approval thereof shall be conclusively evidenced by his execution of the Contract).

[SEAL]

EQUITABLE SHARING OF NORTH SLOPE CRUDE OIL

A Study Requested by Congress in Section 18 of the Alaska Natural Gas Transportation Act

April 1977

FEA/G-77-137
FEDERAL ENERGY ADMINISTRATION

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EXECUTIVE SUMMARY

This report has been prepared in response to Section 18 of the Alaska Natural Gas Transportation Act of 1976. That section requires the President to report to the Congress, within 6 months of the date of its enactment, on (1) "what special expediting procedures are necessary to ensure the equitable allocation of [Alaskan] North Slope crude oil to the Northern Tier States . . . to carry out the provisions of Section 410 of Public Law 93-153 . . .," (2) "the specific provisions of law which the President finds would inhibit the expeditious construction of an oil delivery system to the Northern Tier States . . .," and (3) "what effect such a delivery system will have on reducing the dependency of New England and the Middle Atlantic States on foreign oil imports."

Background

In July 1977, crude oil production from the Alaskan North Slope will begin to be shipped to the port of Valdez, Alaska, through the Trans-Alaska Pipeline. The initial throughput will be absorbed on the West Coast of the United States. Beginning perhaps as early as November 1977, the quantity available will likely exceed the requirements of West Coast refineries.

A number of distribution alternatives, both short and long term, have been proposed for the disposition of North Slope crude oil. Section 410 of the Trans-Alaska Pipeline Authorization Act requires the President to use his authority to ensure an "equitable allocation" of available North Slope and other crude resources and petroleum products "directly or indirectly" among "all regions and all of the several States."

This report examines both the short- and long-term alternatives for the disposition of Alaskan oil, to deter-

mine generally if the purpose of Section 410 will be served by those systems, and particularly whether such purposes will be served with respect to the Northern Tier States, in which a number of refineries are being affected by the phase-out of crude oil exports ordered by the government of Canada.

Conclusions

Based upon the analysis contained in this report, the following conclusions have been drawn:

- Any of the several long-term pipeline proposals which contemplate shipment of Alaskan North Slope crude oil to pipeline distribution centers east of the Rocky Mountains could benefit all sections of the Nation, including at least a portion of the Northern Tier States.

- The distribution of Alaskan North Slope crude oil to Gulf Coast refineries will help to reduce the dependence of New England and the Middle Atlantic States on imported oil.

- The Federal Government, in response to Section 18 of the Alaska Natural Gas Transportation Act, is taking those steps necessary to expedite construction of permanent delivery systems for North Slope crude oil.

- There are significant environmental issues involved in all the the [sic] pipeline delivery proposals which require additional time for analysis and resolution by the Federal Governments of the United States and Canada and the various States that would be transited. With proper management and coordination, existing law and procedures will allow for thorough review of the environmental issues in a reasonably expeditious manner.

- This report cannot fully address the short-term situation regarding the delivery of crude oil to the Northern Tier States. Canadian crude oil export policy is under

review and an FEA assessment will be completed and presented to the Congress when the Canadian policy is clarified.

- Based upon what is currently known about Canadian export policy, there are available alternatives for the distribution of North Slope crude oil and for providing supplies of crude oil to the Northern Tier States for a period of time sufficient to analyze and resolve the issues surrounding the long-term proposals.

I. *Legislative Background and Introduction*

Section 18 of the Alaska Natural Gas Transportation Act of 1976 (ANGTA), enacted on October 22, 1976, provides that, within 6 months of enactment, the President must report to the Congress on the following matters:

(1) "what special expediting procedures are necessary to insure the equitable allocation of North Slope crude oil to the Northern Tier States of Washington, Oregon, Idaho, Montana, North Dakota, Minnesota, Michigan, Wisconsin, Illinois, Indiana, and Ohio . . . to carry out the provisions of Section 410 of Public Law 93-153 . . . [the Trans-Alaska Pipeline Authorization Act];"

(2) "the specific provisions of law, which relate to any determinations of a Federal officer or agency as to whether to issue or grant a certificate, permit, right-of-way, lease, or other authorization in connection with the construction of an oil delivery system serving the Northern Tier States and which the President finds would inhibit the expeditious construction of such a system in the contiguous States of the United States . . . ;" and,

(3) "the impact that the delivery system will have on reducing the dependency of New England and the Middle Atlantic States on foreign oil imports."

The section also contains a mandate that all Federal officers and agencies shall "expedite to the fullest practicable extent all applications and requests for action made with respect to such an oil delivery system."

Public Law 93-153, referred to in Section 18, authorized the construction of the Trans-Alaskan Pipeline System (TAPS). Section 410 thereof states:

> "The Congress declares that the crude oil on the North Slope of Alaska is an important part of the Nation's oil resources and that the benefits of such crude oil should be equitably shared, directly or indirectly, by all regions of the country. The President shall use any authority he may have to ensure an equitable allocation of available North Slope and other crude oil resources and petroleum products among all regions and all of the several States."

The apparent intent of Section 18 of the ANGTA is to require the President to insure that the purposes of Section 410 of P. L. 93-153 will be satisfied as delivery systems are developed to distribute North Slope crude oil, and report to the Congress on what special expediting procedures are necessary to ensure that these purposes will be met with respect to the Northern Tier States in particular.[1] Thus, to satisfy the requirements

[1] An indication of Congressional intent with regard to the purpose of Section 18 is contained in the following exchange during the debate on the ANGTA (*Congressional Record* of October 1, 1976, page S17729).

> "Mr. Stevens . . . It is my understanding that Section 18 is not a directive or command to any Federal officer or agency, but rather, expresses the sense of the Congress that administrative action should be taken expeditiously to help alleviate the forthcoming west coast crude oil surplus. It is also my understanding that this section does not express a congressional preference for any particular pipeline route. I would ask the gentleman if my understanding is correct.
>
> Mr. Stevenson . . . The Senator from Alaska is indeed correct in his understanding of Section 18. Section 18 is merely a reaffirmation of the sense of the Congress expressed in Section 410 of Public Law 93-153, that either directly or indirectly the benefits of North Slope crude oil should be shared equitably by all regions of the country. Whatever pipeline route or routes are ultimately utilized to transport North Slope crude oil from the West Coast. Section 18 expresses the will of Congress that Federal administrative actions, within the context of existing laws, be taken expeditiously to permit crude oil to be transported from the West Coast to other points in the United States."

of Section 410, these delivery systems must ensure that the benefits of North Slope crude oil will be "equitably shared, directly or indirectly, by all regions of the country."

To comply with the requirements of Section 18, therefore, the President must (1) determine whether the systems currently planned or under consideration for delivery of North Slope crude oil to the contiguous United States satisfy the requirement that the benefits of such crude oil be equitably shared, directly or indirectly, by all regions of the country, including particularly the Northern Tier States; (2) identify the provisions of Federal law related to the issuance of certificates, leases, rights-of-way, permits or other authorizations in connection with delivery systems planned for construction in the contiguous United States, which are intended, directly or indirectly, to serve the Northern Tier States, and determine if such provisions will inhibit the expeditious construction of such systems; (3) determine what, if any, special expediting procedures with respect to the permitting process are necessary to insure that the Northern Tier States equitably share, directly or indirectly, in the benefits of North Slope crude

oil; (4) determine the impact that such delivery systems will have on reducing the dependency of New England and the Middle Atlantic States on foreign oil imports; (5) insure that all Federal officers and agencies expedite to the fullest extent practicable all applications and requests for action made with respect to systems; and (6) report his findings with respect to items (1) through (4) above to the Congress.

This Report documents these findings.

II. *Background*

Production of crude oil from the Alaskan North Slope, which contains about one-third of the Nation's total proven oil reserves, will begin to flow to U.S. refineries in the summer of 1977. Initial production will be from the main Prudhoe Bay field. By January 1, 1978, TAPS will carry 1.2 million B/D (barrels per day) of crude oil from Prudhoe Bay to the port of Valdez, on the southern coast of Alaska. During the early 1980's, this amount may be increased to 1.6 million B/D and, if further major discoveries are made on the North Slope, could later be increased to 2 million B/D, the TAPS line's design capacity. This large new source of domestic petroleum supply will be of substantial benefit to the Nation. By replacing an equivalent number of barrels of imports, it will aid in reducing our growing dependence on foreign oil. It will also save nearly $6 billion in annual dollar outflow in 1978 over what would otherwise be the case and provide other benefits to the economy which will be shared by the Nation as a whole.

The opening of this new area of production, however, because it begins a shift away from traditional oil producing areas of the Southwestern region of the country and thus requires the planning and provision of new distribution systems, has been accompanied by controversy over which regions of the country will receive the impacts—both desired and undesired—of direct delivery of North Slope crude oil. Many factors must be taken into account in planning for these new distribution systems, including the availability and cost of transportation, the capability of refiners to process the oil, the availability and cost of other sources of petroleum supply (either crude or product) to the receiving region, and the ability to mitigate environmental impacts.

III. *Regional Distribution*

This section discusses the dependency of U.S. refiners on foreign imports by region. It then looks specifically at the West Coast and the three regions of the country identified in Section 18 (and therefore of primary concern to this report), i.e., the Northern Tier, New England, and the Middle Atlantic States.

A. *Refinery Dependence on Imports, By Region*

The U.S. is becoming increasingly dependent on crude oil from foreign sources. Crude oil imports made up 33 percent of refinery feedstock in 1975, rose to 39 percent in 1976, and are expected to increase to 41 percent in 1977. The relationship between domestic and foreign crude oil run in U.S. refineries is shown in Table I.

PAD District I, the East Coast, has been the most dependent on foreign crude for refinery input, having run more foreign than domestic crude in all but two of the years from 1966 to 1975, and obtaining over 83 percent of its crude from foreign sources since 1973. PAD District V, the West Coast (and Alaska and Hawaii), has historically been the region next most reliant on imported crude with refinery use of foreign feedstock gradually increasing from about 20 percent in 1968 to 50 percent in 1976.

TABLE I

U.S. CRUDE OIL REFINERY RUNS BY P.A.D. DISTRICT—DOMESTIC vs FOREIGN

(Thousands of barrels per day)

	DISTRICT I		DISTRICT II		DISTRICT III		DISTRICT IV		DISTRICT V		TOTAL				
Year	Domestic	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic	Foreign	Total Crude Runs	Foreign Crude Runs as a % of Total Crude Runs
1966	540	711	2,660	150	3,664	1	325	18	1,024	368	8,221	1,223	9,444	13.0
1967	630	587	2,698	156	3,901	2	326	18	1,095	357	8,695	1,120	9,815	11.4
1968	596	707	2,744	[1]214	4,110	2	339	27	1,248	324	9,038	1,274	10,312	12.4
1969	560	749	2,778	[1]240	4,263	[2]	351	35	1,267	391	9,214	1,415	10,629	13.3
1970	706	584	2,844	[1]310	4,357	—	345	47	1,297	380	9,549	1,321	10,870	12.2
1971	649	632	2,853	[1]377	4,433	54	360	45	1,239	503	9,539	1,661	11,200	14.8
1972	547	971	2,850	[1]461	4,741	75	360	57	1,193	661	9,491	2,205	11,696	18.9
1973	537	1,264	2,774	[1]711	4,656	398	372	44	1,167	808	9,206	3,225	12,431	25.9
1974	536	1,173	2,654	[1]679	4,817	786	376	44	1,098	770	8,681	3,452	12,133	28.5
1975	166	1,238	2,630	[1]778	4,066	1,179	380	45	1,083	840	8,325	4,083	12,408	32.9
1976	170	1,415	2,611	[1]909	3,957	1,760	391	51	1,088	1,034	8,167	5,249	13,416	39.1
1977	160	1,490	2,570	[1]1,030	3,820	2,230	385	45	1,845	940	8,280	5,785	14,015	40.9
1978	150	1,520	2,500	[1]1,100	4,150	2,250	385	40	1,865	575	9,050	5,480	14,535	37.7

[1] Preliminary.

[2] FEA estimates.

[3] Includes some Athabasca hydrocarbons.

[4] Less than 1,000 barrels daily.

Source: Bureau of Mines Petroleum Statement, Annual and December Issues and Federal Energy Administration.

PAD IV, the Rocky Mountain States, as a whole has little refinery capacity, and is the region least dependent on imported crude oil (from Canada), using only 12 percent imported feedstock in 1976. (Montana is, however, more heavily dependent. See Table VIII—Montana Supply/Demand Balance.)

Table II shows refinery use of foreign crudes by region, both actual and projected, for the years 1975 through 1978. Estimates for 1978 show the effect on regional dependency of an assumed short-term approach to the distribution of North Slope oil, i.e., the delivery of about 500,000 B/D through the Panama Canal to Gulf Coast refineries, replacing an equivalent amount of imports and declining domestic production there.[1] These estimates also assume that imports from Canada continue to decline, and that 700,000 B/D of North Slope oil replaces a like amount of imports to West Coast refineries. Due to current refinery limitations, the 1978 estimate assumes that 575,000 B/D of imported light, low-sulfur crude oil, primarily Indonesian, will continue to be required by PAD V refiners.

---

[1] In its April 15, 1977, Report to Congress, on the Pricing of Alaska North Slope Crude Oil, FEA estimated that the volume of North Slope crude that would be available for delivery outside of PAD V would be in the range of 400,000-600,000 B/D. The 400,000 B/D figure was used for the pricing discussion contained in that report, in keeping with the assumption used in the report to adopt, for purposes of analysis, the case resulting in the highest first sale price. It was recognized in that report, however, that to achieve that result, it would be necessary to back out every possible barrel of imported crude oil for which Alaska North Slope crude is substitutable. The 500,000 B/D figure is considered to be a more likely outcome.

TABLE II

REGIONAL DISTRIBUTION OF FOREIGN OIL USED IN U.S. REFINERIES, 1975-78

(Excluding Caribbean Refineries)

	1975	1976	1977 Est.	1978 Est.
Dist. I East Coast	88%	89%	90%	91%
Dist. II Midcontinent	23%	27%	29%	31%
Dist. III Gulf Coast	23%	31%	37%	35%
Dist. IV Rocky Mountains	11%	12%	10%	9%
Dist. V West Coast	44%	50%	41%	24%
Total U.S.	33%	39%	41%	38%

Source: Table I.

Under these short-term conditions, the addition to domestic supply of 1.2 million B/D of Alaskan North Slope crude in 1978 is expected to reduce U.S. refinery use of imported crude from 41 to 38 percent. Decline in the use of imports would be expected in PAD's III, IV, and V. In PAD II, the Midcontinent area, where a decline in domestic production has created a crude oil supply problem (with the corresponding need for new or expanded pipeline systems), dependence on imports would increase slightly, to 31 percent.

The Northern Tier area, which encompasses the northern portions of PADs II, IV, and V, will receive a low level of imports from Canada, but will continue to receive some imports from other sources. The East Coast will remain highly dependent on foreign crude. The reasons for this are discussed in Part D of this section, dealing with New England and the Middle Atlantic States.

B. *West Coast*

Because the costs of transporting Alaskan oil by tanker to the West Coast of the United States are relatively low, this region is seen as the primary receiving point. If all of the Alaskan oil could be used on the West Coast, it would displace an equivalent amount of crude imports (now over 1 million B/D). At the time TAPS was authorized, in late 1973, demand for petroleum products on the West Coast, which has traditionally been supplied from regional production augmented by substantial imports of light, low-sulfur crude oil from Indonesia and Canada, was expected to increase at its historic annual rate—4.4 percent. The Arab oil embargo, however, along with higher prices and conservation efforts, resulted in a greater than 5 percent *decline* in demand in 1973-74. Subsequent annual growth in demand for petroleum product has been at 2-3 percent, and, in 1976, regional demand just regained 1973 levels. In addition, new production sources, such as NPR-1 at Elk Hills, California, Outer Continental Shelf areas, and enhanced recovery projects, have increased supply on the West Coast.

A major factor which determines the amount of North Slope crude that can be processed on the West Coast is the nature of refinery configurations in the region. Unlike the East Coast, West Coast petroleum product demand, with the exception of some imports of low-sulfur residual fuel oil, has traditionally been met by regional refineries. A significant proportion of West Coast refinery capacity is designed to process primarily light, low-sulfur crudes, such as are imported from Canada and Indonesia. A portion of this type of capacity has been or will be extensively modified to process the heavier, higher sulfur North Slope crude.[2] Because such modifications require 3 years to complete, however, no

[2] 0.9-1.1 percent sulfur, API 26°-28°.

more than 600,000-800,000 B/D of refining capacity for North Slope type crude is expected to be operational before 1980. It is probable, therefore, that West Coast refineries will continue to require more than 500,000 B/D of crude imports through 1980. Projected supply and demand for crude oil in PAD V through 1979 is summarized below.

PAD V Refinery Supply and Demand for Crude Oil
(MB/D)

	1977	1978	1979
Supply			
Alaska	440	1,350	1,340
North Slope	270	1,200	1,200
South Alaska	170	150	140
Lower 48	945	965	1,010
Foreign Imports	940	525-625	525-625
Refinery Demand	2,325	2,440	2,490
Shipment Out of PAD V	—	400-500	385-485

Beyond 1980, the amount of PAD V crude available to other regions of the country will be influenced by oil pricing policy, OCS leasing rates, future development on the North Slope of Alaska, and the extent of enhanced recovery activities in California.

C. *Northern Tier States*

1. *General*

The Northern Tier States named in Section 18 are Washington, Oregon, Idaho, Montana, North Dakota, Minnesota, Michigan, Wisconsin, Illinois, Indiana, and Ohio. Between the early 1950's and the early 1970's, these States became increasingly dependent on imports from Canada, primarily of light crudes. At their highest level, 1.1 million B/D in 1973, Canadian crude oil imports made up about 30 percent of the Northern Tier

States' supply. Northern Tier crude oil transportation systems and refining capacity were, therefore, designed to handle large amounts of supply from this source.

In late 1974 the Canadian Government, as discussed below, announced plans to gradually curtail exports to the United States to zero by 1982. At that time, imports from Canada averaged about 800,000 B/D, and provided about 26 percent of Northern Tier crude oil supply. By 1976 Canadian crude imports had been reduced to a small percentage of the crude feedstock to all Northern Tier refineries, but remained above 25 percent for eleven landlocked refiners who had restricted access to replacement supplies.

Canadian plans for curtailment of exports to the U.S. are undergoing continual change. Beginning in January of 1977, Canada further modified its export policy to differentiate between light and heavy crudes. The export allocation and 135,000 B/D of heavy crudes. In February and March of this year, Canada allowed the export of amounts of heavy crude oil above the amounts established under the allocation program. The Canadian National Energy Board is currently reviewing and revising the schedule of exports to the U.S.

Several means of meeting the cutoff in Canadian crude through alternate sources of crude or product supply and exchanges have been adopted or are under consideration by refiners in Northern Tier States. Refiners located in Illinois, Indiana, and Ohio are receiving crude supplies through existing pipelines from the Midwest, Southwest, and Gulf Coast. In addition, product demand in these areas may be met through pipeline and barge shipments from the Gulf Coast and Mid-continent refining centers.

The impact of the declining availability of Canadian crude oil on Washington, northern Idaho, Montana, North Dakota, Minnesota, Michigan and Wisconsin is being

monitored by the Federal Energy Administration, and will be reevaluated by FEA once revised Canadian policy is announced. It is in this area that the refineries which have been most dependent upon Canadian crude have limited access to other supplies, and all or portions of three States (eastern Washington, Montana, and northern Idaho) could experience significant product shortfalls as a result. The discussion that follows is based upon FEA's analysis of short and long-term crude oil and product supplies to this area. Information concerning Canadian imports contained in this analysis is based upon National Energy Board projections of total exports which were announced in September 1975. The recent changes in NEB policy, which provide for separate licensing of exports of light and heavy crude, could result in shortfalls in Montana and eastern Washington at an earlier date than projected in FEA's preliminary short term analysis presented here. Possible changes are presently being analyzed by FEA in anticipation of an announcement in May 1977 by the Canadian Government of the level of exports that will be permitted the second half of 1977 and in 1978. Following the May announcement, supply to the Northern Tier States will be reevaluated by FEA, and a report on the FEA's analysis will be sent to the Congress promptly thereafter.

2. *The Effect of Canadian Government Actions*

Virtually 100 percent of Canadian crude oil production comes from the three western provinces of British Columbia, Alberta and Saskatchewan, while eastern Canada is dependent largely upon OPEC imports. By 1970, western Canada had developed to the point where Canada was self-sufficient, in the sense that it was producing as much oil in the western provinces as it was consuming on a national basis. But a considerable volume of western crude was being exported and had to be replaced in the eastern provinces with imports.

In October 1974, the National Energy Board (NEB), conducted its first annual public hearing on the export of crude oil. Evidence presented showed that Canadian oil production would decline from 2.1 million barrels per day in 1975 to about 1.7 million in 1980 and 1.3 million in 1985, and that by the early 1980's domestic supplies would no longer be sufficient to meet Canadian domestic feedstock requirements.

Most of the volume drop will occur in Alberta, which currently accounts for 85 percent of Canadian output. It was estimated that by 1985, domestic production would satisfy only 75 percent of western Canada's requirements, and none of eastern Canada's. Based on these findings, the NEB recommended to the national government that exports of oil be reduced gradually and be terminated by the early 1980's unless significant new production came on stream.

The criteria governing energy exports are set out in the National Energy Board Act. Essentially, exports will be allowed only after all Canadian requirements have been met. In the fall of each year, the NEB holds public hearings on Canada's anticipated supply and demand situation, in order to recommend maximum authorized levels of exports for the following year and to provide some indication of likely supply levels for subsequent years.

In light of NEB projections of production and domestic demand, the Canadian Government announces its schedule for phasing out oil exports to the United States. The Canadian curtailment schedule authorized exports of 1 million B/D in 1974 and the U.S. imported 878,000 B/D; in 1975, 800,000 B/D was authorized for export and the U.S. imported 674,000 B/D. The 1976 Canadian export level was made contingent on the phasing in of the Sarnia-Montreal Pipeline and the result was that

the U.S. imported all of the Canadian oil made available, 437,000 B/D. In 1973, Canadian exports to the U.S. market averaged 1.1 million B/D, over half of total Canadian production.

The NEB sets the level of exportable surplus for only one year at a time. However, in its 1975 report, the Canadian Government provided data from which a projection could be made as to possible levels of exports for each year through 1982. This anticipated schedule, based on 1975 information, is shown in Table III.

The Government of Canada now has its export policy under review, and a revised schedule for 1977 and 1978 is expected to be announced in May. It is likely that the actual level set by the revised schedule will be different from that shown in Table III. In addition, the revised schedule will continue to distinguish separate export levels for light and heavy crude, and may result in less volume actual being imported by some U.S. refiners, due to their limited capacity to receive and/or use heavy crude oil. (In January 1977, Canada began differentiating between light and heavy crude oil in issuing export licenses.)

TABLE III

CANADIAN EXPORTS OF CRUDE OIL AND CONDENSATE [1]

Year	Actual and Anticipated Canadian Exports to United States (Thousand of Barrels Daily)
1971	755
1972	939
1973	1,109
1974	878
1975	674
1976	437
1977	[2] 255
1978	[2] 166
1979	[2] 85
1980	[2] 55
1981	[2] 5
1982	[2] 0

3. *Operational Constraints*

At present, the Canadian crude oil production and transportation system requires certain minimum levels of crude oil production and/or pipeline utilization for efficient operation. These "operational constraints" include minimum pipeline thruputs, necessary condensate production, and the inability of some crude oil to be transported to some areas due to absence of pipelines. Because these constraints affect the level of Canadian requirements for various component crudes, the relative proportions of crudes exported will change as total Canadian exports are reduced. These changes may result in operational problems and the need for adjustment in the Mandatory Canadian Crude Oil Allocation Program administered by the Federal Energy Administration.

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[1] Source of actual data is the Bureau of Mines.

[2] Anticipated based on data contained in 1975 National Energy Board Report on Crude Oil Exports. As a result of hearings held in October 1976, it is anticipated that this schedule will be changed in May 1977. In particular, the recent Canadian decision to separately allocate light and heavy crude for export may result in less volumes actually being imported by some U.S. refiners, due to their limited capacity to receive and/or use heavy crude oil.

2. [sic] *Analysis by State* [3]

Michigan

Table IV presents the supply/demand balance for Michigan. It is not expected that there will be a short-

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[3] This analysis is based on the following Supply/Demand Balance Assumptions:

Supply

Crude supply data for both 1976 and 1977 were obtained from individual interviews with each of the refiners in the Northern Tier. Forecasts for 1978, 1979, and 1980 were made using the following assumptions:

1. Alaskan North Slope crude will be available to meet 88,000 B/D of the needs of Washington State refineries in late 1977 provided that the Alaskan pipeline becomes operational in 1977.
2. Due to limited existing and projected crude pipeline capacity, exchanges of crude between U.S. and Canadian refiners through Chicago will not exceed 80,000 B/D. If the level of exchanges is lower, then crude deficiencies would no doubt have to be replaced by higher levels of product shipments into these States with reduced supply.
3. The FEA Buy/Sell Crude Oil Allocation, Canadian Crude Allocation and Entitlement Programs will all be extended essentially as they are now.
4. The Williams Pipeline expansion to bring more crude oil to the Minneapolis, Minnesota, area will be operational in late 1977 at 80,000 B/D, will expand to 100,000 B/D in 1978, and will reach 130,000 B/D (Phase II) by 1979.
5. Crude shipped through the Williams Pipeline would be of foreign origin landed at Gulf Coast ports.
6. Availability of crude to southern Minnesota would allow reclassification of the two refineries in that area from Priority I to Priority II in the FEA Canadian Crude Oil Allocation Program, making available additional crude to Priority I refineries and, possibly, additional supply to Priority II refineries on a pro-rata basis.
7. Domestic crude production (excluding Alaska) will continue to decline, and supplier/puchaser relationships under FEA's regulations (§ 211.63) will continue as currently determined.
8. The Michigan power plant which burns crude oil will be switched to residual fuel oil by late 1977.

[Footnote continued on page 215]

TABLE IV

MICHIGAN—SUPPLY/DEMAND BALANCE (MB/D)

	1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY					
Intrastate	54.0	53.0	52.0	51.0	50.0
Interstate					
Other Northern Tier	0	0	0	0	0
Other Domestic	45.6	44.7	43.7	42.7	41.7
North Slope/Alaska	0	0	0	0	0
Total Domestic Supply	99.6	97.7	95.7	93.7	91.7
FOREIGN CRUDE SUPPLY					
Canadian [1]					
MCAP 10CFR 214	54.4	39.7	35.1	17.7	11.4
By Exchange	0	0	10.0	10.0	10.0
Other Foreign	21.9	29.8	51.7	77.9	76.7
Total Foreign Supply	76.3	69.5	96.8	105.6	98.1
TOTAL CRUDE SUPPLY	175.9	167.2	192.5	199.3	189.8
TOTAL REFINERY YIELD (0.95 Total Crude Supply)	167.1	158.8	182.9	189.3	180.3
PRODUCT INSHIPMENTS					
Non-Northern Tier					
From	398.9	423.2	417.1	427.7	454.7
(To)	0	0	0	0	0
Northern Tier					
Wisconsin —From	0	0	0	0	0
—(To)	0	0	0	0	0
Minnesota —From	0	0	0	0	0
—(To)	0	0	0	0	0
North Dakota —From	0	0	0	0	0
—(To)	0	0	0	0	0
Montana —From	0	0	0	0	0
—(To)	0	0	0	0	0
Washington —From	0	0	0	0	0
—(To)	0	0	0	0	0
Net Inshipments	398.9	423.2	417.1	427.7	454.7
TOTAL SUPPLY	566.0	582.0	600.0	617.0	635.0
TOTAL DEMAND	566.0	582.0	600.0	617.0	635.0
CRUDE SHORTFALL	0	0	0	0	0
PRODUCT SHORTFALL (0.95 Crude)	0	0	0	0	0

[1] Based upon NEB's Sept. 1975 projections these volumes are expected to be changed by the revised Canadian export schedule to be announced in May 1977. Source: FEA preliminary analysis

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[3] [Continued]

9. The curtailment of Canadian crude supplies will follow the schedule shown in Table III.

Demand

Product demand for each state was based on a forecast developed by Bonner and Moore Associates, Inc., entitled, *Crude Supply Alternatives for the Northern Tier States* (Vol. II, July 1976).

Historical data was from Bureau of Mines reports, supplemented by direct data from Northern Tier States. The following assumptions are implicit in the calculations:

1. Winter weather is normal.
2. Increase in demand due to natural gas curtailments is insignificant. (Minnesota, for example, estimated that natural gas curtailments could add about 1.3 percent to its petroleum product demand growth rate.)

fall of either crude or products for Michigan in the 1976-1980 time period. However, to meet growth in demand, product inshipment is projected to increase from 398,900 B/D in 1976 to 454,700 B/D in 1980. In 1975-78 percent of Michigan demand was met by product inshipments. These shipments will vary between 69 and 72 percent in the 1976-1980 time period and will be made from the Chicago and Toledo refinery centers, assuming there is no difficulty in shipping crude to these centers.

Wisconsin

Table V shows the supply/demand balance for the State of Wisconsin. In 1976 over 91 percent of the State petroleum demand was met by product shipments from other States, and 88 percent of these shipments came from non-Northern Tier States. This trend is forecast to continue through 1980. By 1980 92 percent of the State's demand will be met by such product inshipments, with over 80 percent of supply coming from non-Northern Tier States. Minnesota will continue to supply between 10.8 and 11.4 percent of Wisconsin's petroleum product demand. There is sufficient product pipeline capacity into Wisconsin from either the South or Minnesota to meet demands through 1980, even if the one refinery in Wisconsin were to be phased out of operation. However, this would place about 20,000 B/D additional requirement on Minnesota out of the Minneapolis refining center.

TABLE V

WISCONSIN—SUPPLY/DEMAND BALANCE (MB/D)

		1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY						
Intrastate		0	0	0	0	0
Interstate						
Other Northern Tier		0	0	0	0	0
Other Domestic						
North Slope/Alaskan		0	0	0	0	0
Total Domestic Supply		0	0	0	0	0
FOREIGN CRUDE SUPPLY						
Canadian [1]						
MCAP 10CFR 214		25.6	24.7	28.3	16.6	10.7
By Exchange		0.1	3.0	3.0	10.6	16.1
Other Foreign		0	0	0	0	0
Total Foreign Supply		25.7	27.7	31.3	27.2	26.8
TOTAL CRUDE SUPPLY		25.7	27.7	31.3	27.2	26.8
TOTAL REFINERY YIELD (0.95 Total Crude Supply)		24.4	26.3	29.7	25.8	25.4
PRODUCT INSHIPMENTS						
Non-Northern Tier						
From		225.4	228.6	232.5	240.0	246.6
(To)		0	0	0	0	0
Northern Tier						
Michigan	—From	0	0	0	0	0
	—(To)	0	0	0	0	0
Minnesota [2]	—From	30.2	31.1	30.8	34.2	35.0
	—(To)	0	0	0	0	0
North Dakota	—From	0	0	0	0	0
	—(To)	0	0	0	0	0
Montana	—From	0	0	0	0	0
	—(To)	0	0	0	0	0
Washington	—From	0	0	0	0	0
	—(To)	0	0	0	0	0
Net Inshipments		255.6	259.7	263.3	274.2	281.6
TOTAL SUPPLY		280.0	286.0	293.0	300.0	307.0
TOTAL DEMAND		280.0	286.0	293.0	300.0	307.0
CRUDE SHORTFALL		0	0	0	0	0
PRODUCT SHORTFALL (0.95 Crude)		0	0	0	0	0

[1] Based on NEB Sept. 1975 projections. These volumes are expected to be changed by the revised schedule to be announced in May 1977.

[2] Net Product Shipments—Wisconsin receives more product than it ships to Minnesota.

Source: FEA preliminary analysis.

Minnesota

Table VI presents the supply/demand balance for Minnesota. In 1976 net product shipments to Minnesota amounted to 42.2 percent of total demand. Due to curtailment of Canadian feedstocks, product shipments are projected to increase to 47.8 percent by 1978 and to decrease by 1980 to 42.2 percent. This growth could be supplied via existing product pipeline capacity. In 1978

Minnesota spare product pipeline capacity would amount to only 20,000 B/D, or 10 percent, which could result in seasonable shortages. However, the planned expansion in the Williams Pipeline should increase the volume of "other foreign crude" available to Minnesota refiners, and therefore product inshipment requirements will probably be less than projected here.

TABLE VI

MINNESOTA—SUPPLY/DEMAND BALANCE (MB/D)

	1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY					
Intrastate	0	0	0	0	0
Interstate					
Other Northern Tier	21.7	22.5	18.0	18.0	18.0
Other Domestic	11.4	15.3	12.6	10.6	13.9
North Slope/Alaskan	0	0	0	0	0
Total Domestic Supply	33.1	37.8	30.6	28.6	31.9
FOREIGN CRUDE SUPPLY					
Canadian					
MCAP 10CFR 214[1]	139.7	134.9	27.0[3]	13.3	8.6
By Exchange	2.0[2]	10.0	10.0	16.0	26.0
Other Foreign	0	0	100.0[4]	130.0	130.0
Total Foreign Supply	141.7	144.9	137.0	159.3	164.6
TOTAL CRUDE SUPPLY	174.8	182.7	167.6	187.9	196.5
TOTAL REFINERY YIELD (0.95 Total Crude Supply)	166.0	173.6	159.2	178.5	186.7
PRODUCT INSHIPMENTS					
Non-Northern Tier					
From	149.3	162.5	186.1	178.9	184.1
(To)	0	0	0	0	0
Northern Tier					
Michigan —From	0	0	0	0	0
—(To)	0	0	0	0	0
Wisconsin[5] —From	0	0	0	0	0
—(To)	(30.2)	(31.1)	(30.8)	(34.2)	(35.0)
North Dakota —From	30.0	30.0	30.0	30.0	30.0
—(To)	(28.1)	(39.0)	(39.5)	(39.2)	(42.8)
Montana —From	0	0	0	0	0
—(To)	0	0	0	0	0
Washington —From	0	0	0	0	0
—(To)	0	0	0	0	0
Net Inshipments	121.0	122.4	145.8	135.5	136.3
TOTAL SUPPLY	287.0	296.0	305.0	314.0	323.0
TOTAL DEMAND	287.0	296.0	305.0	314.0	323.0
CRUDE SHORTFALL	0	0	0	0	0
PRODUCT SHORTFALL (0.95 Crude)	0	0	0	0	0

[1] Based on NEB Sept. 1975 projections. These volumes are expected to be changed by the revised Canadian export schedule to be announced in May 1977.

[2] Includes exchanges from Priority I to Priority II refineries in 1976.

[3] Effect of reclassification of Ashland and Koch to Priority II when Williams Crude Pipeline becomes operational.

[4] This volume should increase due to a recent Williams Pipeline decision to expand capacity early in 1978.

[5] Net Product Shipments-Wisconsin receives more product than Minnesota.

Source: FEA preliminary analysis.

North Dakota

Table VII shows the supply/demand balance for North Dakota. The product shipments into North Dakota are projected to grow from 31.4 percent of product demand in 1976 to 54.8 percent in 1980. At present, North Dakota both receives product from and supplies product to Minnesota, including product that is shipped through Minnesota from other States; in balance, however, the net flow is small. By 1980 Minnesota refineries or product pipelines flowing through Minnesota from other states will provide a net shipment into North Dakota of about 12,800 B/D. Product pipelines should be sufficient to meet the State's petroleum demands, although if not

TABLE VII

NORTH DAKOTA—SUPPLY/DEMAND BALANCE (MB/D)

	1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY					
Intrastate	36.2	34.0	31.9	30.0	28.3
Interstate					
Other Northern Tier	1.0	1.0	1.0	1.0	1.0
Other Domestic	0	0	0	0	0
North Slope/Alaskan	0	0	0	0	0
Total Domestic Supply	37.2	35.0	32.9	31.0	29.3
FOREIGN CRUDE SUPPLY					
Canadian					
MCAP 10CFR 214	4.0	0	0.2	0	0
By Exchange	5.0[1]	0	0	3.0	3.0
Other Foreign	0	0	0	0	0
Total Foreign Supply	9.0	0	.2	3.0	3.0
TOTAL CRUDE SUPPLY	46.2	35.0	33.1	34.0	32.3
TOTAL REFINERY YIELD					
(0.95 Total Crude Supply)	43.9	33.2	31.4	32.3	30.7
PRODUCT INSHIPMENTS					
Non-Northern Tier					
From	10.0	12.2	11.5	12.5	11.5
(To)	0	0	0	0	0
Northern Tier					
Michigan —From	0	0	0	0	0
—(To)	0	0	0	0	0
Wisconsin —From	0	0	0	0	0
—(To)	0	0	0	0	0
Minnesota —From	28.1	39.0	39.5	39.2	42.8
—(To)	(30.0)	(30.0)	(30.0)	(30.0)	(30.0)
Montana —From	12.0	10.6	13.6	13.0	13.0
—(To)	0	0	0	0	0
Washington —From	0	0	0	0	0
—(To)	0	0	0	0	0
Net Inshipments	20.1	31.8	34.6	34.7	37.3
TOTAL SUPPLY	64.0	65.0	66.0	67.0	68.0
TOTAL DEMAND	64.0	65.0	66.0	67.0	68.0
CRUDE SHORTFALL	0	0	0	0	0
PRODUCT SHORTFALL (0.95 Crude)	0	0	0	0	0

[1] Includes exchanges from Priority I to Priority II refineries in 1976.

Source: FEA preliminary analysis.

expanded by 1980, there will be only 8 percent spare product pipeline capacity and some seasonal or spot shortfalls may occur.

Montana

Table VIII presents Montana's supply/demand balance for the 1976-1980 time period. Although preliminary data showed that Montana would have more than enough

TABLE VIII

MONTANA—SUPPLY/DEMAND BALANCE (MB/D)

	1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY					
Intrastate	23.6	22.4	21.3	20.2	19.2
Interstate					
Other Northern Tier	0	0	0	0	0
Other Domestic	44.9[1]	48.4[1]	50.0	50.0	50.0
North Slope/Alaskan	0	0	0	0	0
Total Domestic Supply	68.5	70.8	71.3	70.2	69.2
FOREIGN CRUDE SUPPLY					
Canadian					
MCAP 10CFR 214	58.4	55.7[2]	63.9[2,3]	37.3[2]	24.3[2]
By Exchange	1.0	0	0	10.0	10.0
Other Foreign	0	0	0	0	0
Total Foreign Supply	59.4	55.7	63.9	47.3	34.3
TOTAL CRUDE SUPPLY	127.9	126.5	135.2	117.5	103.5
TOTAL REFINERY YIELD (0.95 Total Crude Supply)					
PRODUCT INSHIPMENTS					
Non-Northern Tier					
From	11.7	12.7	7.0	15.0	15.0
(To)	0	0	0	0	0
Northern Tier					
Michigan —From	0	0	0	0	0
—(To)	0	0	0	0	0
Wisconsin —From	0	0	0	0	0
—(To)	0	0	0	0	0
Minnesota —From	0	0	0	0	0
—(To)	0	0	0	0	0
North Dakota —From	0	0	0	0	0
—(To)	(12.0)	(10.6)	(13.6)	(13.0)	(13.0)
Washington —From	0	0	0	0	0
—(To)	(37.2)	(37.3)	(34.8)	(25.6)	(27.2)
Net Inshipments	(37.5)	(35.2)	(41.4)	(23.6)	(25.2)
TOTAL SUPPLY	84.0	85.0	87.0	88.0	73.1
TOTAL DEMAND	84.0	85.0	87.0	88.0	90.0
CRUDE SHORTFALL	0	0	0	0	17.8
PRODUCT SHORTFALL (0.95 Crude)	0	0	0	0	16.9

[1] Based on interview with refineries.

[2] Based on NEB Sept. 1975 projections. These volumes are expected to be changed by the revised Canadian export schedule to be announced in May 1977.

[3] This volume could be considerably less under the revised Canadian export schedule.

Source: FEA preliminary analysis.

crude to meet its own petroleum demand, the inclusion of Montana refineries' requirements to supply product to western North Dakota, northern Idaho, and eastern Washington indicated that Montana itself might fall short of product by 1980.[4] (Eastern Washington is heavily dependent on Montana refineries, and some product will have to continue to be shipped to meet that area's needs). It is not clear from current projections that Montana will have sufficient crude oil supply to make up the possible shortfall, unless alternative short-term measures are implemented.

Washington

Table IX gives the supply/demand situation for the total State of Washington. However, a full picture of the supply/demand situation for Washington State can be determined only by viewing the State as two supply/demand regions, eastern Washington and western Washington.

Eastern Washington

Table X shows a constructed supply/demand balance for eastern Washington. This table has been developed based upon available product pipeline capacity into eastern Washington from the Billings, Montana, and the Salt Lake City, Utah areas, and barging capabilities on the Columbia River System. However, by 1979 eastern Washington will likely experience a product shortfall of over 10,000 B/D, due to projected demand growth and

[4] This shortfall could occur as early at 1978 if the Canadian allocation of light crude oil decreases relative to heavy crudes, as anticipated. Montana refineries are constrained in their ability to receive and process heavy, sour crude oils.

to the decreased availability of product from Montana. If higher rates of growth are assumed for this area, or if Canadian crude supplies to Montana are less than projected, the shortfalls could start to appear as early as late 1977, or early 1978. Higher barge shipments on the Columbia River could possibly be utilized to meet this shortfall. However, questions as to the Columbia River barging capacity need further study.

TABLE IX

WASHINGTON—SUPPLY/DEMAND BALANCE (MB/D)

	1976	1977	1978	1979	1980
DOMESTIC CRUDE SUPPLY					
Intrastate	0	0	0	0	0
Interstate					
Other Northern Tier	0	0	0	0	0
Other Domestic	12.0	0	0	0	0
North Slope/Alaskan	0	88.0	105.0	110.0	115.0
Total Domestic Supply	12.0	88.0	105.0	110.0	115.0
FOREIGN CRUDE SUPPLY					
Canadian					
MCAP 10CFR 214	75.2	0	6.3	0	0
By Exchange	3.7	15.0	15.0	15.0	15.0
Other Foreign	197.9	182.0	166.2	162.4	158.6
Total Foreign Supply	276.8	197.0	187.5	177.4	173.6
TOTAL CRUDE SUPPLY	288.8	285.0	292.5	287.4	288.6
TOTAL REFINERY YIELD (0.95 Total Crude Supply)	274.4	270.8	277.8	273.0	274.2
PRODUCT INSHIPMENTS					
Imported [1]	21.0	21.0	21.0	21.0	21.0
Non-Northern Tier					
From	18.0	18.0	18.0	18.0	18.0
(To)	(117.6)	(109.1)	(107.6)	(88.6)	(85.4)
Northern Tier					
Michigan —From	0	0	0	0	0
—(To)	0	0	0	0	0
Wisconsin —From	0	0	0	0	0
—(To)	0	0	0	0	0
Minnesota —From	0	0	0	0	0
—(To)	0	0	0	0	0
North Dakota —From	0	0	0	0	0
—(To)	0	0	0	0	0
Montana —From	37.2	37.3	34.8	25.6	27.2
—(To)	0	0	0	0	0
Net Inshipments	(41.4)	(32.8)	(33.8)	(24.0)	(19.2)
TOTAL SUPPLY	233.0	238.0	244.0	249.0	255.0
TOTAL DEMAND	233.0	238.0	244.0	249.0	255.0
CRUDE SHORTFALL	0	0	0	0	0
PRODUCT SHORTFALL (0.95 Crude)	0	0	0	0	0

[1] 21 MB/D of finished and unfinished oil was imported into Puget Sound in 1975 from various foreign sources and this level is assumed at a minimum to continue.

Source: FEA preliminary analysis.

TABLE X

Eastern Washington
Supply/Demand Balance
(MB/D)

Year	Columbia River Barge	Billings, Montana	Salt Lake City, Utah [2]	Total Supply	Total Demand [1]	Short-Fall
1975	15.6	39.0	17.0	71.6	71.6	—
1976	18.0	37.2	18.0	73.2	73.2	—
1977	19.5	37.3	18.0	74.8	74.8	—
1978	23.6	34.8 [3]	18.0	76.4	76.4	—
1979	23.8 [4]	25.6	18.0	67.4	78.1	10.7
1980	23.8	27.2	18.0	69.0	79.8	10.8

[1] 2.2% Growth in demand has been assumed, i.e., the same as for the total State of Washington.

[2] Via Boise, Idaho to Pasco, Washington with rated capacity of 18 MB/D.

[3] This volume could be less, depending upon volumes of Canadian crude available to Billings refiners.

[4] Maximum annual petroleum product shipment on Columbia River System (up) at McNary Dam Lock was 23.8 MB/D in 1973.

Source: FEA preliminary analysis.

Western Washington and Oregon

The market area for western Washington also includes western Oregon and to a lesser extent eastern Oregon. Most of the remainder of Oregon's product supply comes from the San Francisco and the Salt Lake City areas. Of all the Northern Tier areas, western Washington and Oregon will be affected least by the loss of Canadian crude imports. Although western Washington and western Oregon have historically been almost totally dependent on product refined from Canadian crude supplied via the Trans-Mountain pipeline, the refineries supplying these areas can alternatively receive crude from tankers through existing facilities. However, tanker traffic in the Puget Sound area is a source of continuing concern in Washington State, principally because of the potential for oil spills.

For part of the 1977-1980 period, western Washington will become more dependent on foreign crude oil (other than Canadian) for replacing curtailed supplies of Canadian crude and for satisfying growing demand for petroleum products. Short-term plans for importing foreign crude increase this area's vulnerability to a crude oil embargo.

5. *Crude Supply Alternatives (1977-1980)*

In the 1977-1980 time period, there are only a limited number of alternatives for supplying additional crude into some Northern Tier States, such as Montana and eastern Washington. The principal alternatives are: (a) U.S./Canadian crude exchanges, (b) more use of indigenous crude in the Northern Tier States, (c) modification of the Mandatory Canadian Crude Oil Allocation Program, and (d) use of unit trains.

a. *U.S./Canadian Exchanges*

An increase in the level of commercial crude oil exchanges between Canadian and U.S. refiners is one of the more attractive short-term solutions to the decline in imports of Canadian crude oil; exchanges require no capital investment and can be quickly implemented if approved by both governments. Exchange oil is available in addition to the Canadian exportable surplus and, therefore, is not covered by the FEA Mandatory Canadian Crude Oil Allocation Program.

In 1975 a joint U.S./Canadian Working Party agreed that commercial exchanges between Canadian and U.S. companies should not be hindered by regulation, as long as such exchanges are consistent with national energy policies of both countries. It was also agreed that the individual governments would not participate in exchanges but would promote an atmosphere conducive to them.

The responsibility for granting export licenses for U.S. domestic crude oil is vested in the Department of Commerce (DOC) under authority of the Export Administration Act of 1969. Although this Act has lapsed, its policy is continued in DOC regulations under other legislation. Section 3, paragraph 2, of the Export Administration Act stated, in part:

> "It is the policy of the United States to use export controls . . . to the extent necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand . . ." [5]

In response to DOC's request that FEA review exchange applications to ensure that they are not inflationary and that no windfall profits accrue to the parties involved, FEA formed a Committee on Canadian Crude Oil Exchanges on August 4, 1976. The Committee reviews applications to determine: (1) that the proposed exchange meets the objective of supplying additional crude oil to Canadian-dependent refineries; (2) that the domestic crude exported is not being taken from a crude-deficient area where physical replacement would be difficult; and (3) whether or not there is any other feature of the exchange that would make it undesirable. It then recommends to DOC action on issuance of export licenses.

To avoid distortion in crude prices and in the value of entitlements, a firm seeking an export license is required to structure exchanges on a barrel-for-barrel basis, with

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[5] Section 28(u) of the Minerals Lands Leasing Act of 1920, as amended, appears to exempt under some circumstances, domestically produced crude oil transported through pipeline rights-of-way granted under Section 28(a) of that Act and exchanged with persons or the governments of either Canada or Mexico from the licensing requirements of the Export Administration Act of 1969 as amended. Regulations governing this exemption have not been promulgated by the Secretary of the Interior.

only normal quality and location differentials. Commerce also requires the potential exporter to certify in the export application that the exported oil is deemed to be retained for purposes of FEA's Entitlements Program.

Exchange negotiations are limited by several factors, including: (1) Canada's decision to maintain the Sarnia/Montreal pipeline at full capacity; (2) Canada's current requirement that only U.S. domestic crude be received in exchange for Canadian crude; and (3) current limitations on available capacity in pipelines from the Gulf Coast.

In some cases, exchanges may be constrained because certain Canadian crudes can be transported by only a limited number of pipelines. Examples of operational constraints are: (1) certain Canadian crudes can be moved only in one direction; (2) the placement of natural gas plants requires that some condensates move along the specific lines, and (3) some heavy crudes must be cut with lighter crudes for pipeline efficiency. Operational constraints will become increasingly important in 1978 and 1979 in determining whether Canadian crude streams may actually be available to certain Northern Tier refiners, even if equal amounts of domestic crude oil can be obtained by those refiners for exchange.

In Canada, the Trans-Mountain, Rangeland, and Interprovincial pipelines currently move crudes from Alberta and Saskatchewan into the Northern Tier States. Several exchange possibilities would permit continued use of these lines as well as guaranteeing first priority refineries sufficient volumes of Canadian crude to meet their requirements for 1977-1980.

Another option for exchanges is the utilization of the Portland pipeline from Portland, Maine to Montreal. This pipeline has a current capacity of 504,000 B/D. In 1976 throughput was 472,000 B/D, but this may decrease

to 222,000 B/D in 1977 as a result of the completion of the Sarnia/Montreal pipeline. Foreign or domestic crude owned by U.S. companies could be transported via this spare capacity in the Portland line to meet the needs of Montreal and the Quebec area. This would also alleviate the bottleneck problems in the Lakehead system and meet both Canadian and U.S. needs.

Yet another option is transportation of crude from the Gulf Coast to the Lakehead pipeline and then to Montreal. This presents problems due to the limited spare capacity in pipelines to Chicago. Spare capacity from Cushing and Patoka, Illinois, is anticipated to be tight in 1977 and will become even tighter in 1978 and 1979. Possible solutions to this problem would be conversion to crude service of the Explorer product pipeline, a 28-inch line from Houston to Tulsa and a 24-inch line from Tulsa to Chicago. The Explorer Pipeline Company has informed FEA that it has sufficient spare capacity to carry up to 55,000 B/D of crude oil from the Gulf Coast to Chicago, if commitments totalling 30,000 B/D for six months are made by the refiners to warrant the additive investment by Explorer to provide this capacity. The crude would then move into Canada if sufficient volumes of Canadian crude were displaced through the Rangeland/Glacier, and Minnesota lines, thus making additional capacity available on the Lakehead system. This arrangement would make possible exchanges in which Gulf Coast crude were made available to Sarnia and the Quebec area, in return for additional Alberta sweet crude to Montana, North Dakota, Minnesota and Wisconsin.[6]

The Government of Canada is very hesitant to approve exchanges which would depend on crude oil other than U.S. domestic. This restriction on exchanges is significant because spare pipeline capacity from the Gulf of

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[6] See footnote 5.

Mexico through Chicago is not adequate to provide domestic crude sufficient to meet all of the potential for Canadian exchanges. Canada has, however, recently indicated a willingness to consider exchanges for foreign crude if certain conditions are met, including full utilization of U.S. midcontinent pipelines.

To date the FEA has approved a total of 80,000 B/D of import licenses to fulfill exchange applications by nine Northern Tier refiners. In addition, four U.S. refiners have recently applied to the FEA and to the NEB for exchanges totaling 49,000 B/D of foreign oil to be delivered in Montreal for Canadian oil to be delivered at their refineries. Approval of these recent applications would depend on a change in Canadian policy. The U.S. and Canadian governments are currently discussing this possibility.

b. *Use of Indigenous Crudes in the Northern Tier States*

One possible solution to the crude oil supply problems of the Northern Tier refineries is the redistribution by FEA of indigenous crude oil produced in Michigan, Montana, North Dakota, and Wyoming to the refineries most in need of additional crude oil in the Northern Tier States. Although crude oil reserves and production for these States, with the exception of Michigan, are projected to decline gradually over the years, there would still be sufficient crude oil in 1978 and 1979 to reduce significantly the impacts produced by the Canadian export cutbacks (assuming transportation is available to reallocate to those refineries that have no alternative means of incremental supply). Reserves and production data for these four States for the years 1970-1975 are shown in Table XI.

FEA regulations (10 CFR 211.63) currently require that domestic crude oil production be available to pur-

TABLE XI

RESERVES AND PRODUCTION DATA

	MICHIGAN		MONTANA		NORTH DAKOTA		WYOMING	
Year	Reserves (MB)	Production (MB/CD)	Reserves (MB)	Production (MB/CD)	Reserves (MB)	Production (MB/CD)	Reserves (MB)	Production (MB/CD)
1970	45,615	32.0	241,529	103.8	192,377	60.3	1,017,359	424.1
1971	58,765	32.6	228,185	94.8	174,011	59.3	996,985	396.4
1972	62,002	35.6	241,248	92.9	166,033	56.5	949,779	373.8
1973	72,444	39.7	219,343	94.8	179,520	55.4	916,763	378.2
1974	82,299	49.6	207,389	94.7	172,794	54.0	903,360	377.4
1975	93,312	67.2	163,968	88.4	158,245	54.9	877,385	357.4

chasers who historically purchased the crude. This supplier/purchaser freeze has been considered essential to the enforcement of price and allocation policies mandated by Congress; however, alternatives have not been carefully evaluated and other mechanisms may be feasible. To the extent that current regulations result in crude oil being shipped to a refiner who has access to alternate non-Canadian sources of supply, and thereby precludes its being shipped to a Northern Tier refiner who does not have such access, a hardship may result for petroleum product consumers. Thus it is possible that an exception to or a modification of this regulation may be justified in certain circumstances involving certain Northern Tier refiners.

Table XI shows the crude oil reserve and production data from 1975 for the states of Michigan, Montana, North Dakota, and Wyoming. Table XII shows the distribution of 1975 crude oil production from these same

TABLE XII

DISTRIBUTION OF 1975 CRUDE PRODUCTION

Destination	Origin	Michigan	Montana	N. Dakota	Wyoming
Michigan		65.5%			5.5%
Montana			32.4%		13.7%
North Dakota			4.3%	52.6%	
Wyoming			1.6%		32.7%
Minnesota/ Wisconsin			6.7%	17.7%	.4%
New York, Pennsylvania		15.1%	2.5%		
Illinois, Indiana, Kentucky, Tennessee, Ohio		19.4%	43.6%	26.8%	22.6%
Utah, Colorado			3.4%		10.7%
Other			5.5%	2.9%	14.4%
TOTAL		100.0%	100.0%	100.0%	100.0%

states. The total production of these four states in 1975 was 567,500 B/D, of which approximately 45.5 percent or 258,400 B/D, was distributed to other than Northern Tier states.

The following table presents estimated volumes in thousands of barrels of crude oil controlled, by type of producer by state for 1975.

	Producers w/Canadian Dependent Refineries in the Northern Tier *	Other Refineries	Independent Operators
Michigan	3,759	11,511	8,222
Montana	5,900	19,013	7,867
North Dakota	4,283	10,607	5,507
Wyoming	56,113	32,064	45,425

* Includes only the States of Michigan, Montana, Minnesota, North Dakota, Wisconsin, and Wyoming.

Refineries in the Northern Tier were being run at about 79 percent of capacity during 1975. Given the 1975 crude oil productior total of 567,500 B/D and estimated runs in 1975 of 620,800 B/D, the Northern Tier States could, hypothetically, have supplied approximately 91 percent of 1975 runs with indigenous crude oil from these four States.

Redistribution of indigenous crude oil could benefit those Northern Tier refineries which do not have alternate supply sources and might partially alleviate crude shortages in the Northern Tier. Implementing this alternative would, however, require a major reversal of some pipeline systems in northwestern Wyoming and, more likely, the construction of a new pipeline to ship lighter crudes into the Billings, Montana area. It could not, therefore, be an immediate solution to supply problems that may develop in Montana.

c. *Modification of the Mandatory Canadian Crude Oil Allocation Program*

The Mandatory Canadian Crude Oil Allocation Program (MCAP) was established by FEA to distribute equitably the remaining crude oil exports from Canada. The program provides for the allocation on a preferential basis of crude oil imported from Canada to priority classes of refiners and other firms for six-month allocation periods, commencing with the period beginning January 1, 1976. For each period, the FEA allocates Canadian crude oil by issuing Canadian crude oil rights to refiners and other firms with reference to the volume of Canadian crude oil processed or consumed by their refineries and other facilities in the base period (November 1, 1974, through October 31, 1975). Adjustments to base period volumes were permitted in certain cases where such volumes were not reflective of a firm's normal operations.

Under the program, the two classes of facilities dependent upon Canadian crude sources (and therefore eligible for allocations) are termed "first priority refineries" and "second priority refineries" and are distinguished by their current capability to replace Canadian crude oil with crude oil or alternative fuels from other sources. First priority refineries must demonstrate lack of access to adequate pipeline capacity and/or adequate marine docking facilities, and thus have no current capability to replace Canadian crude with other crude or alternative fuel. Refineries whose Canadian crude runs were less than 25 percent of their total runs in the base period are not considered sufficiently dependent on this Canadian crude oil to warrant being given first priority status in the allocation of Canadian crude oil to U.S. facilities. Second priority refineries are facilities that processed Canadian crude oil in the base period but do not meet the criteria for first priority status.

The allocation program provides that if the average total supply of crude oil available from Canada during

a six-month allocation period is less than the total base period supply, all first priority refineries are entitled to receive their full amounts with the shortages being shared by all second priority refineries on a pro-rata basis. Once the allocation entitlement of first priority refineries exceeds that supply, second priority refineries receive no allocations and first priority refineries share any shortfall on a pro-rata basis.

By reducing the allocation period from six months to quarterly, flexibility could be created to allow for adjustment to seasonal shifts in product demand and thus responsiveness to seasonal or spot supply problems. By increasing the number of priority classes, greater flexibility in differentiating among the needs of particular refineries could be achieved.

d. *Use of Unit Trains*

The use of unit trains is discussed in Section IV of this report, which discusses the short-term alternatives for the disposition of Alaskan North Slope oil. It is noted that unit trains may also be feasible for shipment of light foreign crude oil to Northern Tier refineries which are not designed for heavy North Slope crude oil.

6. *Refining Capacity*

As shown below, refining capacity in the Northern Tier States named in Section 18 totals about 3.3 million

(Thousand barrels per calendar day)

State *	Crude Capacity **	Sour Crude Capability ***
Illinois	1,182	440
Indiana	562	210
Michigan	150	45
Minnesota	262	210
Montana	156	140
North Dakota	59	25
Ohio	590	90
Washington	367	110
Total	3,320	1,270

* A small asphalt plant in Oregon is not included.

** *Oil and Gas Journal*, March 28, 1977, pp. 99-123.

*** FEA estimate.

B/D. Approximately 1.3 million B/D of sour crude oil (sulfur content above .5 percent) could be handled by refineries in these States. Factors affecting the willingness of refiners to process Alaskan North Slope crude include (1) physical capability to handle the sulfur and metallic impurities in the crude; (2) availability of competing indigenous crudes of similar properties; (3) availability of competing foreign crudes which could be delivered economically to refinery sites east and south of the Chicago refining center; and (4) product slate requirements. Possible imports of Canadian heavy oils also add to the uncertainty of the competitiveness of Alaksan North Slope crude. Of course, changes in refinery configurations could increase the ability of Northern Tier refiners to handle additional North Slope-type crude oil if economic factors were favorable.

Thus, although each of the proposed northern systems for the delivery of Alaskan oil could, with the construction of relatively short pipeline connections in addition to the major route, serve all portions of the Northern Tier, because of the factors noted above, it is not presently clear to what extent Alaskan North Slope oil would be delivered to this market, even if a pipeline route were provided.

D. *New England and Middle Atlantic States*

New England, with almost no regional refining capacity, relies on imports from foreign countries and the U.S. Caribbean, mainly of residual fuel oil, and on products shipped from the Gulf Coast and Mid-Atlantic States. Refineries in the Mid-Atlantic States of the East Coast depend on imports for about 90 percent of their crude feedstock. These refineries, however, supply only about 25 percent of total East Coast product demand. About 50 percent of East Coast demand is met by products from the Gulf Coast, and the remaining 25 percent by imports, mainly from the Caribbean area.

Because of the supply patterns described above, proposed systems to deliver North Slope crude oil to the Northern Tier States would have very little direct impact on the situation in New England and the Middle Atlantic States. Systems which would deliver increased amounts of North Slope and other domestic crude to the Gulf Coast would, to the extent they replace imports to those refiners which supply East Coast product markets, serve to reduce indirectly the dependency of New England and the mid-Atlantic States on foreign imports. The direct receipt of North Slope crude oil into the New England and Middle Atlantic States does not at this time appear economically feasible due to the high costs that would be associated with such long distance movements.

IV. *Short-Term Delivery System Proposals*

For the reasons discussed in Section V of this Report, none of the various pipeline proposals which are currently being studied as long-term delivery systems for North Slope crude could be completed by December 1977 when substantial quantities of North Slope crude oil will become surplus to the West Coast and must be shipped to areas other than PAD V. The earliest completion date estimated by proponents of these projects is December 1978, and, more likely, no west-to-east pipeline system would be operational until mid-1979 at the earliest. It is therefore essential that a short-term transportation system be in place by the fall of 1977 to handle the excess volumes.

There are three short-term alternatives for distributing volumes which cannot be absorbed by West Coast refiners:

—Distribution by railroad tank cars to the central United States;

—Distribution by tanker through the Panama Canal to the Gulf Coast or around Cape Horn to the Carribbean;

—Exchanges with foreign countries.

Each of these alternatives is discussed briefly below:

A. *Distribution by Tank Car to the Central United States*

Two proposals for shipment by tank cars are being considered by producers of the North Slope crude. Routes being considered are from Port Westward or Portland, Oregon to Minot, North Dakota, and from Los Angeles to refineries in the Southwest and Midwest. The Port Westward-Minot proposal could also benefit refiners in Montana.

The Portland-Minot proposal would require a substantial expansion in port facilities to offload more than 30-35 MB/D. This would raise substantial environmental questions concerning air and water quality at the mouth of the Columbia River. In addition, the only economic mode of transporting large quantities of crude oil by rail would be by "unit train" (a train made up only of tank cars). Department of Transportation regulations on the transportation of hazardous materials which presently require that "buffer" cars that are either empty or loaded with a non-hazardous material be used on unit trains, substantially increase shipping costs. Both the Burlington Northern and Southern Pacific Railroads have petitioned the Materials Transport Bureau for exemptions from these regulations (49 CFR 174.90 et seq.).

B. *Tankers*

Two tanker alternatives, shipment of North Slope crude from Valdez, Alaska through the Panama Canal to the Gulf Coast, and shipment around Cape Horn to the Caribbean have been proposed as interim methods of

providing for use of North Slope crude oil by refineries which supply the eastern United States. In the Gulf Coast plan, crude oil would move in large tankers from Valdez, Alaska, to a point off the coast of Panama, where, because of draft limitations in the Panama Canal and at Gulf Coast ports, it would be transferred to smaller tankers, moving through the Canal to the Gulf Coast. The transfer to small tankers would not be necessary if the Cape Horn route were used to transport the oil to certain Caribbean refiners.

Alaskan crude oil landed on the Gulf Coast could be used by refineries in that area to displace imports. Gulf Coast refiners supply petroleum products to most of the eastern third of the United States. In addition, crude oil landed on the Gulf Coast could displace domestic crude oil moving to the Gulf Coast refineries from the Permian Basin in west Texas. These volumes might be redirected to midcontinent refineries which serve portions of the Midwest and Northern Tier areas.

Section 27 (the Jones Act) of the Merchant Marine Act of 1920 requires that all marine trade between U.S. ports, whether coastwise or intercoastal, be strictly limited to U.S.-built and documented vessels owned by U.S. citizens. In addition to vessels engaged primarily or exclusively in this domestic trade, there are also U.S. flag vessels engaged in the U.S. foreign trade which satisfy the Jones Act requirements. Such foreign trade vessels clearly may be used in the domestic trade unless they are or have been subsidized pursuant to the Merchant Marine Act of 1936.

The 1936 Act established two types of direct subsidy program: one for the operation of U.S. flag vessels in the foreign trade, and one for the construction of U.S. flag vessels for use in that trade. While not prohibiting the use of vessels subsidized under either program in the domestic trade, the statutory provisions of these programs

do place some limitations on the transfer of subsidized vessels to the domestic trade, involving mainly suspension or repayment of subsidy. U.S. flag ships which receive such construction differential subsidies ("CDS") and operating differential subsidies ("ODS") may be used in marine trade between U.S. ports only (1) for six months in any year, (2) upon condition that they repay a prorated portion of the construction subsidy and forego the operating subsidy, and (3) if the Secretary of Commerce makes a finding that such action will further the purposes of the 1936 Act.

Recent studies by the Maritime Administration (MARAD) indicate that the domestic tanker fleet will not be sufficient to transport to the Gulf Coast those volumes of crude oil that will be excess to the needs of PAD V. Because of inadequate tonnage in the U.S. domestic tanker fleet, MARAD will promulgate a proposed rulemaking to establish procedures for approving the transfer of CDS and ODS tankers to the domestic service, upon application. (Such promulgation may have occurred by the time this report is printed and distributed.) Final regulations for such transfers should be in effect by the end of May 1977. It is anticipated that, once the procedural rules and guidelines are in place, applications can be processed within a short time of receipt, and there need not, therefore, be any undue delays in obtaining authorizations for use of CDS and ODS tankers, if they are required.

C. *Exchanges with Foreign Countries*

In passing the legislation authorizing construction of the Trans-Alaska Pipeline, Congress amended Section 28 of the Mineral Leasing Act of 1920 to prohibit exports of oil transported over rights-of-way granted pursuant to the Act, except that which is exported (1) temporarily to an adjacent country solely for reasons of convenience

or increased efficiency of transportation across the adjacent country for reentry into the U.S., or (2) is exported to a non-adjacent country pursuant to the limitations of the Export Administration Act of 1969 and after the President has published an express finding that such exports will not diminish the total quantity and quality of petroleum to the United States and are in the national interest. In the case of exports to a non-adjacent country, the President's decision to allow exports must be submitted to the Congress, which may disapprove that action by the passage of a concurrent resolution stating disagreement with the President's national interest finding within 60 days of submission.

At the present time, the potential for exchanging North Slope crude with oil from the adjacent countries of Canada and Mexico is negligible. In the near term, exchanges of North Slope oil with Canada would require it to be transported to the eastern provinces, the only area with access to the sea where Canada has refineries capable of processing it. With regard to Mexico, there do not presently exist the transportation systems that would be necessary to exchange significant volumes of oil.

There has, however, been some suggestion of the possibility of exchanges with Japanese or other Far Eastern refiners of Alaskan oil for Middle Eastern oil which would otherwise be delivered to the Far East. Under this exchange option, Alaskan oil would be traded to, say, Japan, on a barrel-for-barrel basis, for oil purchased by Japanese refiners in the Middle East, which oil would then be shipped to the Gulf Coast. To date, the President has made no decision with respect to whether such exchanges should be recommended.

Such exchange transactions could potentially result in transportation cost savings, inasmuch as the combined tanker costs from Valdez to the Gulf Coast and from the

Persian Gulf to Yokohama appear to be somewhat greater than the combined costs of the Valdez-Yokohama and Persian Gulf-Gulf Coast voyages. The exact amount of the transportation savings would, however, depend upon the extent to which U.S. or foreign flag tankers are used. (In FEA's report to the Congress on April 15, 1977, regarding the pricing of Alaskan North Slope oil, the transportation savings was estimated to be $1.31 per barrel using foreign flag tankers for both legs of the exchange and $.54 using U.S. flag tankers for the Valdez-Yokahama leg only.) If exchanges were approved, it is possible that some of these transportation savings would have to be shared with the United States' exchange partners in order to induce their participation.

If foreign exchanges are approved at all, the President might want to impose certain limitations on their terms and conditions. For example, it may prove appropriate to impose a limitation on the time period that exchanges would be approved, in order to provide the maximum encouragement for the construction of one or more permanent transportation systems on the North American continent to move Alaskan crude oil to the interior of the U.S. It might also be desirable to "capture" some of the transportation savings of foreign exchanges for the benefit of consumers, rather than the North Slope producers, by making appropriate adjustments in the entitlements program. Exchange terms might also be structured so as to allow the U.S. to terminate the exchange in the event that another embargo is imposed on the U.S.

Except to the extent that the transportation savings of exchanges are captured and passed on to all consumers through the entitlements program, the effect of exchanges on the Northern Tier States appears to be no different from that of the proposed shipment of North Slope oil through the Panama Canal, since in either case the incremental supply of oil obtained from the North Slope would be landed on the Gulf Coast of the U.S.

V. *Long-Term Delivery Proposals*

A. *General*

A number of proposals have been made for west-to-east crude oil pipelines in the United States. Some of these proposals are designed primarily to provide a solution to the problems faced by Northern Tier refineries as a result of the phase-out of Canadian exports; others are designed primarily to deal with the excess of crude oil supply on the West Coast. It should be noted that most of the proposed projects would not handle Alaskan North Slope oil exclusively. In fact, because many Northern Tier refineries were designed for sweet Canadian crudes, the Northern pipeline proposals all contemplate shipment of large quantities of imported light, sweet crude oil (as well as North Slope oil) to replace the declining Canadian imports, at least until such time as Northern Tier refineries are reconfigured to process heavier and higher sulphur crude oil.

Geographically, the proposed projects may be grouped into two categories:

1. Projects primarily proposed to move imported and Alaskan crude oil from the West Coast to the Northern Tier and upper Midcontinent areas. These projects are:

   a. Kitimat Pipeline.

   b. Reversal of Trans-Mountain Pipeline.

   c. Northern Tier Pipeline.

2. Projects primarily proposed to move available Alaskan crude oil from the West Coast to the Gulf Coast and lower Midcontinent areas. These projects are:

   a. Sohio Pipeline.

   b. Central American Pipeline.

In addition, there are several proposed projects designed to move crude oil to the upper Midcontinent and Northern Tier areas from the South. These include Loop and Seadock deepwater terminal proposals offshore in the Gulf Coast area, and proposed expansions in the Williams and Minnesota Pipelines. While these projects are not necessarily designed to transport Alaskan crude oil, each has the potential for making crude oil available to refiners in the upper Midwest area to compensate for the reductions in Canadian imports. However, since these projects are designed primarily as delivery systems for Gulf Coast or imported crude oil, only the Williams Pipeline, which will serve a few refineries in the Northern Tier and which could potentially accept Alaskan crude oil delivered to the Gulf Coast area through pipeline inter-connections, will be included in the following discussion of long-term delivery systems. The Central American Pipeline proposal is also not discussed inasmuch as this proposal would have the same impact on crude oil supply to the Northern Tier States as delivery by tanker through the Panama Canal to the Gulf Coast.

The location of all of the previously mentioned long-term options is depicted on Figure 1.

Some long-term delivery projects are in an advanced stage of the Federal approval process, such as the Sohio project, which made application for Federal approvals as early as May 1975. Other projects, such as the Northern Tier Pipeline, have not yet applied for any Federal permits. Table XIII is a comprehensive list of permits and approvals required by Federal agencies with respect to the construction of marine terminals and/or pipelines.

The Federal permitting process for marine terminal and pipeline facilities must be viewed as an integrated process, driven in large part by the environmental review process. Under Section 102(2)(C) of the National En-

Crude Supply Alternatives for Disposition of Alaskan Oil

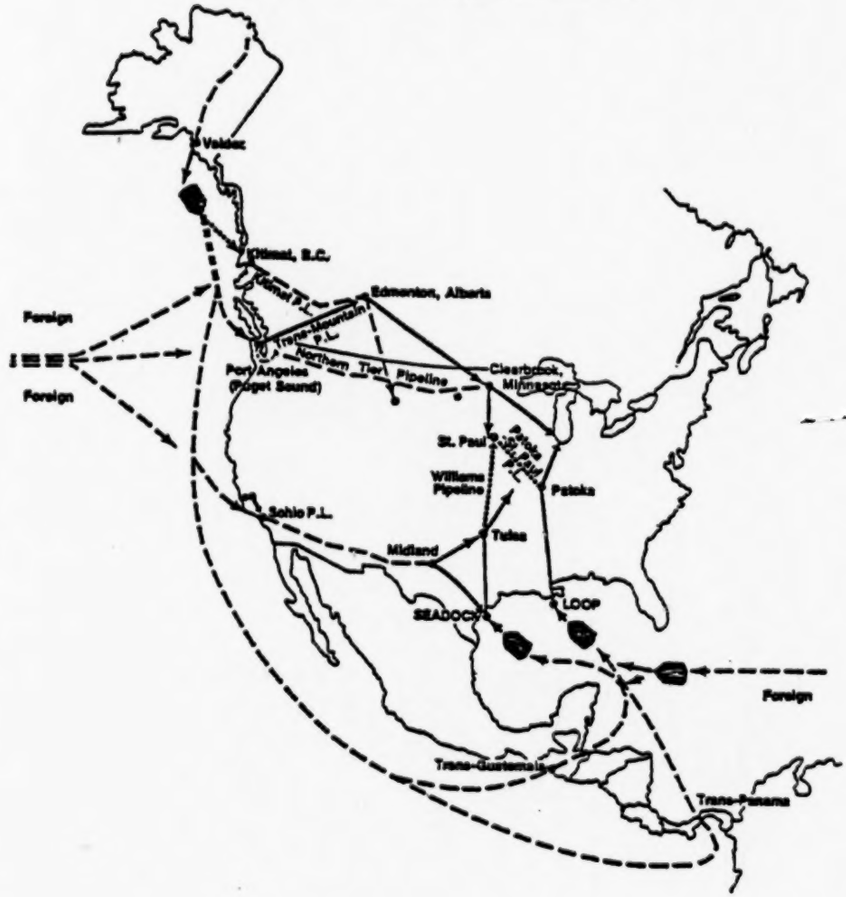


FIGURE I

TABLE XIII

Federal Agencies Having Project Approval Requirements [1]

Agency	Activity Requiring Approval	Form	Code of Federal Regulations
U.S. Department of Agriculture			
Forest Service	Construction of related facilities on National Forest System lands	Permit	36 CFR 251, et seq.
	Road construction or use of roads in National Forest System lands	Permit	36 CFR 212, et seq.
	Removal of mineral or vegetative materials from National Forests	Permit	36 CFR 251.4 36 CFR 221, et seq.
	Use of off-road vehicles on National Forest System lands	Permit	36 CFR 295, et seq.
Department of the Army			
Corps of Engineers	Construction of Port Facilities	Permit for work in navigable waters	33 CFR 209.120
	Pipeline construction across navigable rivers	Permit for work in navigable waters	33 CFR 209.120
	Pipeline construction across military lands	Easement	32 CFR 552.50, et seq.
Environmental Protection Agency	Transfer piping to storage tanks [2]	Permit to construct	40 CFR 112
	Installation of storage tanks [2]	Permit to construct	40 CFR 52.233
	Operation of storage tanks [2]	Permit to operate	40 CFR 60
	Operation of pumping equipment [2]	Permit to operate	40 CFR 60
	Wastewater discharge	Permit	33 CFR 209.120

[1] Whether or not specific agency approvals will be required will depend upon the proposed project, the route selected, and the location of facilities. It should not be understood from this, therefore, that projects would necessarily require all permits listed here. Also, pursuant to Section 28(c)(2) of the Mineral Leasing Act of 1920, as revised, where the surface of the Federal lands involved in a project is administered by the Secretary (DOI) or by two or more Federal agencies, the Secretary is authorized, after consultation with the agencies involved to grant or renew rights-of-way or permits through Federal lands involved. This does not, however, apply to lands in the National Park System, lands on the OCS or Indian lands. The Secretary's authority under this section has been delegated to the Director, Bureau of Land Management. In addition, in granting rights-of-way involving public lands, consideration must be given to the policies and guidelines spelled out in the Federal Land Policy and Management Act of 1976, P.L. 94-579 (90 Stat. 2743), and the specific requirement of that law which must be met. The pertinent sections are: Section 102(a)(8), (9), and (11); Section 202(a); Section 503; Section 603(a)(c). Other land laws and regulations to be adhered to are: Wild and Scenic Rivers Act; 82 Stat. 906. Endangered Species Act; 16 U.S.C. 1531. Antiquities Act; 34 Stat. 225, as amended; 16 U.S.C. 431-433. Alaska Native Claims Settlement Act of 1971; 43 U.S.C. 1601. Land and Water Conservation Fund Act as amended; 16 U.S.C. 460-1. Sikes Act; Title II; 16 U.S.C. 670. O and C Act; Act of 1937; 50 Stat. 874. Taylor Grazing Act; 43 U.S.C. 315.

[2] In States where authority to issue these permits under the Clean Air Act has been delegated, a State or local agency would exercise this responsibility under standards at least as stringent as those that would be imposed by EPA.

Federal Agencies Having Project Approval Requirements — Continued

Agency	Activity Requiring Approval	Form	Code of Federal Regulations
U.S. Department of the Interior			
Bureau of Reclamation	Pipeline construction across lands under Reclamation's jurisdiction	Easement, lease, license or permit	43 CFR 230
U.S. Department of the Interior			
Bureau of Indian Affairs	Pipeline construction across tribal, individually owned and Federally owned Indian lands	Easement	25 CFR 161
Fish and Wildlife Services	Pipeline construction across certain rivers	Easement	43 CFR 2800
	Pipeline construction across National Wildlife Refuge system lands	Easement	50 CFR 29
Bureau of Land Management	Pipeline construction across public lands administered by the BLM	Easement or permit	43 CFR 2800 and 2880 43 CFR 288 (pending)
National Park Service	Pipeline construction across National Park lands	Easement	36 CFR 5.7 (In some instances, legislation may be required)

Department of Transportation			
Federal Aviation Administration	Permit to construct microwave transmission towers	Notification of construction	14 CFR 77.13
U.S. Coast Guard	Operation of marine facility	Approval of operation	33 CFR 160 and 161
	Construction of pipelines over navigable waters	Permit to construct	33 CFR 114 and 115
Federal Communications Commission			
Safety and Special Radio Services Bureau, Common Carrier Bureau	Operation of Microwave, Mobile Radio Systems and possible Satellite-Earth terminals	Construction permits and licenses	47 CFR Parts 25, 91 and 94

vironmental Policy Act of 1969 (NEPA), all agencies of the Federal Government are required to

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:
>
> (i) the environmental impact of the proposed action;
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;
>
> (iii) alternatives to the proposed action;
>
> (iv) the relationship between local short-term uses of man's environmental and maintenance and enhancement of long-term productivity; and,
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Guidelines established by the Council on Environmental Quality (CEQ) suggest that whenever a major action which could have a significant impact on the environment requires permits from more than one Federal agency, consideration be given to designating a single lead agency to supervise the preparation of the environmental impact statement for the entire project. This process is triggered by application by project sponsors for the necessary permits. The environmental review is performed while the various agencies consider permit applications and the results of that review must be taken into consideration in the decision to grant or deny such permits. While the other criteria for granting of the rights-of-way and permits required may be relatively clear, environmental considerations frequently require

examination of alternate routes or engineering and design modifications.

The drafting of an EIS for a terminal and pipeline facility is a major undertaking, and for a major marine terminal and pipeline proposal often requires a year and a half to two years to complete. The draft EIS must be made available for interested parties for a minimum of 45 days to review and comment upon, prior to preparation of the final statement. A final EIS must then be prepared, incorporating comments received on the draft EIS, and the agency's response to the comments. Following publication of the final EIS, a 30-day review period is required by the CEQ before any administrative decisions to approve the project may be made.

B. *Specific Proposals*

1. *Kitimat Pipeline Proposal*

a. *Description*

The Kitimat Pipeline proposal was conceived as a means of delivering North Slope as well as imported crude oil to refineries in the Northern Tier. Participants in the project include five of those refiners.

The Kitimat Pipeline would involve the construction of a marine terminal in Kitimat, British Columbia and a 753-mile pipeline which would connect with the Interprovincial Pipeline in Edmonton, Alberta. The Interprovincial line runs from Edmonton to Montreal, with connections to pipelines serving U.S. refineries. The proponents have completed engineering and environmental studies for the proposal.

The Kitimat line is designed to have an initial throughput capacity of 300,000 B/D, increasing to 600,000 B/D within 1 to 2 years. Proponents anticipate transporting approximately 70 percent Alaskan crude oil or 210,000-

420,000 B/D, with the remainder to include imports from Indonesia and other foreign sources.

b. *Pipeline Connections*

The Interprovincial Pipeline presently has substantial spare capacity (approximately 350,000 B/D) from Edmonton, where the Kitimat line would join the system, to Chicago. The amount of spare capacity is projected to increase with the decline in Alberta oil production, thus providing the additional throughput capacity that will be required if the Kitimat expansion plan is to become effective. Other connections proposed include the Rangeland-Glacier Pipeline System, serving north central and central Montana (at least 70 miles of new pipe in Alberta is required for this interconnection), the Wascana Pipeline System, which connects with the Midwestern distribution system, and the Minnesota and Lakehead Systems, serving Minnesota, Wisconsin, Illinois, Indiana, and Michigan.

c. *Refinery Capacity*

Refinery capacity in Montana, North Dakota, Minnesota, Wisconsin and Michigan (Kitimat's primary market area) exceeds 600,000 B/D. Kitimat could also deliver Alaskan crude oil to the Chicago area, where refinery capacity is approximately 1 million B/D. The Chicago area also has access to other sources of crude, including Canadian and Midcontinent, as well as Gulf Coast sources, although pipelines running to Illinois and Indiana from these areas now run at or near capacity. Other potential sources for refiners in Kitimat's proposed market area include volumes of heavy Canadian crude which may continue to be available beyond the scheduled phase-out of Canadian exports, as well as volumes which may be transported from the Midcontinent area via the expanded Williams Pipeline.

As noted above, some refiners are not equipped to process Alaskan North Slope crude. Therefore, depending upon the start-up of alternate supply systems to the upper Midwest, and the capability and timing of refinery conversions on the Northern Tier, it is not clear what amount of North Slope oil will be desired to serve the crude needs of all the refiners in the central Northern Tier area.

d. *Allocation of Benefits of Alaskan Oil*

The direct benefits of Alaskan crude oil distributed under the Kitimat proposal would be to refiners in the Northern Tier. The extent of the realization of those benefits would depend upon price considerations and the ability of Kitimat to deliver Alaskan crude at a cost which would compete with other sources of supply.

Indirectly, the Kitimat project could provide some benefit to regions of the country other than the Northern Tier States in the event of an embargo, through the displacement of some domestic crude oil, presently delivered to midwestern refineries from producing areas in the Gulf Coast and Midcontinent, with Alaskan crude oil. Such crude could then be allocated to replace embargoed imports elsewhere.

e. *Permitting Process*

Inasmuch as the Kitimat proposal involves a Canadian marine terminal and pipeline route only, construction of the facilities requires no U.S. Government permits. The only Canadian permits required are a certificate of public convenience and necessity which would be granted by the National Energy Board (NEB) if approved by the Governor in Council (the Cabinet), and a license to construct a marine terminal which would be issued by the Minister of Transport. The Government of Canada has also ordered an independent public inquiry into the effect of the proposal on the marine environment. The results

of this inquiry, as well as a review of the project which is being conducted by the Ministries of Transport and Fisheries and Environment, are to be delivered to the Government by early 1978 and will be taken into consideration by the Cabinet if the NEB recommends certification of the pipeline proposal. The NEB has advised FEA that it expects to either disapprove the proposal or recommend approval to the Government in early 1978. Final Government action on the proposal could then take place as early as January 1978. Kitimat proponents believe that construction could be completed 21 months following approval, which could result in operation in late 1979 or early 1980.

2. *Trans-Mountain Reversal*

a. *Description*

The Trans-Mountain Reversal proposal is a three-phase proposal by the Atlantic Richfield Co. and Trans-Mountain Pipeline Co., involving reversal and looping of the Trans-Mountain Pipeline, which presently delivers oil from Edmonton, Alberta to Canadian refineries in the Puget Sound area. In its initial phase, proposed for January 1979, the project would involve alternating the flow of the pipeline to continue deliveries of light, sweet Alberta crude to the Vancouver refineries, while alternately delivering 160,000 B/D of Alaskan crude from Cherry Point, Washington to Edmonton for distribution through the Interprovincial System.

Phase II, proposed for January 1980, would eliminate alternating flows and operate exclusively from West to East. Phase II assumes the construction of additional pipeline capacity from Cherry Point to a point on the Trans-Mountain Line, just over the Canadian Border, and would require the Vancouver refineries to be willing to receive their supplies through exchanges for U.S. or imported light, sweet crude oils that would be delivered

to them via Cherry Point. During Phase II, 350,000 B/D of Alaskan and imported crude could be delivered to Edmonton.

Phase III, proposed for January 1981, requires further construction of additional capacity from Cherry Point to Edmonton, and anticipates delivery of 950,000 B/D to Edmonton.

The proposal contemplates receipt of crude oil at Arco's Cherry Point Terminal, and would require construction of an additional berth and storage facilities. This project is in early development stages. Engineering and environmental studies have not been completed.

b. *Refinery Capacity*

The Trans-Mountain line presently delivers Albertan crude oil to three refineries in Vancouver, British Columbia. There are also four U.S. refineries in the Northern Puget Sound area which are connected to the Trans-Mountain line but, with the exception of small quantities of Canadian crude received by one such refinery through exchanges, presently are served entirely by tanker deliveries of imported or Alaska Cook Inlet oil. Total refinery capacity (including the Canadian refiners) in the area is 450,000 B/D. Under this proposal the Canadian refineries would continue to receive the Albertan crude they presently use, until Phase II. Only one of the U.S. refineries, Atlantic Richfield Company's Cherry Point facility, is designed to process Alaskan-type crude exclusively (100,000 B/D). The other U.S. refineries in the area (as well as the Canadian refineries after Phase II) would continue to receive mostly imported light, low-sulphur crude, or could be converted to process Alaskan crude. The capacity of refiners in the remaining Northern Tier States to accept volumes shipped through to Edmonton, and from there through the Interprovincial

system, would be as discussed under the Kitimat proposal, above.

c. *Pipeline Connections*

Same as for Kitimat.

d. *Allocation of Benefits of Alaskan Crude Oil*

Direct benefits of Alaskan crude to be distributed by this proposal would accrue to refineries in the Northern Tier only, and would be similar to those of the Kitimat proposal discussed above, except that, in the initial stages of the Trans-Mountain reversal, the volumes would be less. As would be the case with the Kitimat proposal, the extent to which those benefits would be realized will depend upon the price at which Alaskan crude could be delivered to refineries for which alternative sources are available. Indirect benefits to other regions in the event of an embargo would be similar to those of the Kitimat proposal.

e. *Permitting Process*

The proposal will require permits for construction of additional marine facilities on Puget Sound. Permits are required from the Corps of Engineers, and from the State of Washington, which has been delegated authority by EPA to issue NPDES (wastewater discharge) permits and approvals for the construction and operation of new sources of air emissions.

The State of Washington certificates the siting, design and operation of all new energy facilities through a single proceeding conducted by the Energy Facility Site Evaluation Council (EFSEC), under the authority of the Washington Energy Facility Siting Act. EFSEC makes a recommendation to the Governor, who has final certification authority. The State has a Coastal Zone Management Plan, approved by the Secretary of Commerce, as contemplated by the Coastal Zone Management Act, (P.L. 94-370). The Plan designates Port Angeles, Washington as the approved site for all new and expanded marine terminals in the State, and, if enforceable, would require amendment before a facility at Cherry Point could be approved. That aspect of Washington's Coastal Zone Management Plan has been questioned by some parties opposed to the Port Angeles site as being defective in the procedures by which it was adopted.

In addition, a Washington State law prohibiting tankers of greater than 125 M DWT from operating within the inner Puget Sound is presently being appealed to the United States Supreme Court following a three-judge federal district court determination that Federal law preempts such State regulation. If the law is ultimately upheld, it might tend to render the proposal economically unattractive, since Atlantic Richfield's proposal is based on the use of 165,000 DWT tankers to deliver oil to Cherry Point. There is environmental opposition to the use of Cherry Point terminal site due to the potential for and particularly adverse consequences of oil spills within the Puget Sound, which could delay EFSEC's action. Finally, an NEB certificate of public convenience and necessity is required for the reversal of the Trans-Mountain Line in Canada.

No applications have yet been filed for any of the necessary permits in either the United States or Canada. The project's sponsors anticipate a filing with the NEB within the next few weeks. The NEB has indicated to FEA that when the Trans-Mountain application is received, it will be considered as a competitive application in the same proceeding and under the same schedule as its decision on the Kitimat proposal. The public inquiry into the marine aspects of the Kitimat proposal will consider the impact of the marine aspects of the Trans-Mountain proposal as well.

The proponents propose the construction of an additional tanker berth at Cherry Point that will require a permit from the Corps of Engineers. The proponents are of the opinion that this permit does not constitute a major Federal action that would require under NEPA the preparation of an EIS. The issue is debatable, however, and the failure to file an EIS could well be challenged by a coalition of local environmental groups that are opposed to tanker traffic in Puget Sound. The proponents have indicated that, if necessary, Phase I of the proposal could be operational without expanding the current docking facilities at Cherry Point.

The proponents believe that, with Canadian government approval by January 1978 and EFSEC and Corps of Engineers approved [sic] within 6 months of application, Phase I of the proposal could be operational by January 1979. If an EIS must be prepared, the completion date could be extended by several months.

3. *The Northern Tier Pipeline Proposal*

a. *Description*

The Northern Tier Pipeline proposal involves the construction of a port facility for receiving crude oil at Port Angeles, Washington, and a pipeline, 1,550 miles in length, which would connect with the Lakehead Pipeline System in Clearbrook, Minnesota. The proposed line could potentially serve the four U.S. refineries on the upper Puget Sound through the construction of a spur line from approximately North Bend, Washington to Anacortes, but that spur is not currently part of the pipeline design. The pipeline is designed to have an initial throughput capacity of 600,000 B/D and an ultimate capacity of 1.3 million B/D. Engineering and environmental studies are being prepared by proponents of the pipeline.

b. *Refinery Capacity*

The pipeline is designed to serve the same refineries in the Northern Tier States as the Kitimat and Trans-Mountain proposals. The Northern Tier project also depends for its economic viability on service to other refineries in the Midwest because of the limited amount of refinery capacity in the core of Northern Tier States.

The project's sponsors assume that refineries in Northern Tier States from Minnesota west would absorb 400,000 B/D of the pipeline's throughput, and that Midcontinent area refineries could absorb the remaining 400,000-800,000 B/D. Refineries in the Puget Sound area could also be served by the project, if some mechanism is utilized to induce or require these refiners to use the pipeline rather than their own dock facilities. As noted above, about one-quarter of the 450 thousand B/D refining capacity in the Puget Sound area can currently run Alaskan North Slope crude.

c. *Pipeline Connections*

The system would interconnect with the Rangeland-Glacier and Butte pipeline systems in Montana and the Minnesota and Lakehead systems serving refineries in Minnesota, Wisconsin, Illinois, Indiana and Michigan.

d. *Allocation of Benefits of Alaskan Crude Oil*

The direct benefits of the Northern Tier proposal would be available to refineries in the Northern Tier and Midwestern States and would be similar to those anticipated by the Kitimat and Trans-Mountain reversal proposals; however, the economics of this proposal require it to be competitive with other crude oil delivery systems to the Chicago area, whereas Kitimat and Trans-Mountain expect to be able to operate even if their only market is the rest of the Northern Tier. Indirect benefits to

other regions would also be similar to the Kitimat and Trans-Mountain proposals.

e. *Permitting Process*

The full range of Federal permits outlined in the introduction to this chapter would be required for the Northern Tier project.

The pipeline's sponsors have applied for a Site Certification with the Energy Facility Site Evaluation Council in the State of Washington, which, as noted, has been delegated authority to issue the permits required by EPA as well as to carry out its own siting statutes. The permitting process in Washington State may be delayed because of opposition from some State and local officials to the Port Angeles site for the marine terminal. Indeed, Clallam County, in which Port Angeles is located, has already filed suit against the Northern Tier proponents and the State in an effort to prevent the State from certificating Port Angeles as the terminal site. However, the Port Angeles site is favored by some environmental and legislative groups within the State as an alternative to current and expanded tanker traffic into the inner Puget Sound to serve the refineries at Cherry Point and elsewhere.

Only one Federal permit (the easements required from the Bureau of Land Management) has been applied for to date (April 22, 1977). The project's proponents have held preliminary discussions with the Department of the Interior (DOI), which would be the lead agency in supervising preparation of the environmental impact statement for all Federal agency actions involved in the permitting process, and DOI is prepared to proceed expeditiously with the environmental review upon receipt of an application and the payment of fees. All Federal agencies which will be involved in the permitting process have agreed to coordinate their efforts and preparation is

being made, notwithstanding the fact that no formal application has been filed, to expedite the preparation of the EIS to the extent possible.

4. *The Sohio Proposal*

a. *Description*

Standard Oil Company of Ohio (Sohio) owns over 50 percent of the Alaskan North Slope production, and has proposed a transportation system designed primarily to move that production east from the West Coast to the Gulf Coast area.

The project contemplates construction of a marine facility in Long Beach, California and a pipeline connection to an existing Southern California Gas Company natural gas line. This line, and an El Paso Natural Gas Co. line to which it connects, would be converted to crude oil service to Jal, New Mexico. Approximately 200 miles of new pipeline would be constructed from Jal to Midland, Texas, to complete the 1,000-mile system from Long Beach.

The pipeline is designed for a throughput capacity of 500,000 B/D, and the marine terminal is designed for an initial throughput of 700,000 B/D, 200,000 of which would serve existing local refineries. Engineering studies and environmental impact statements required under both Federal and State law are nearing completion. Exxon Pipeline Company has agreed to be a minority participant in the preconstruction aspects of the project.

The Sohio project also involves the prospect of a Phase II that would require the conversion of a second El Paso gas line and the expansion of the marine terminal facilities. Under Phase II, a million B/D could be transported to Midland. Phase II is only in the very early stages of planning, and a decision on whether or not to go ahead with it is not likely to be made until after Phase I is in operations [sic].

b. *Pipeline Connections*

Numerous pipeline connections in the Midland area, which is a center for crude oil distribution, could permit distribution to some refineries in the Northern Tier as well as Midwestern and Gulf Coast refining centers. Sohio concedes that this pipeline network is presently operating near capacity, but anticipates that declines in Permian Basin production in west Texas will result in an increased availability of pipeline capacity of 400 thousand B/D out of Midland by 1978; if this decline does not occur, Sohio proposes to expand existing pipeline capacity by installing additional pumping stations.

Most of the pipeline capacity out of Midland that would be freed by a decline in Permian Basin production would be to the Gulf Coast. However, the planned expansion in the Williams Pipeline would permit crude moved from Tulsa, Oklahoma to serve refineries in Minnesota and Wisconsin. Additional capacity would be required between Midland, Texas and Tulsa, Oklahoma to provide a direct link from the Sohio project to the Northern Tier area.

c. *Refinery Capacity*

PAD III refineries in the Gulf Coast area of the United States, which are the logical recipients of most of the crude proposed to be transported by the Sohio project, currently use approximately 2 million B/D of imported crude oil, much of it of a quality similar to North Slope crude oil. Minnesota and Wisconsin refineries which could be served via the Sohio and Williams Pipelines, could accept slightly under 200 thousand B/D of Alaskan-type crude.

d. *Allocation of Benefits of Alaskan Crude Oil*

The Sohio proposal could distribute crude oil directly to the Gulf Coast and Midcontinent, as well as States

located in the eastern half of the Northern Tier (from Minnesota eastward). Indirect benefits, from products refined in these areas, would be available to most States East of the Mississippi River.

e. *Permitting Process*

All of the Federal permits described in the introduction to this chapter are required for the Sohio project. In addition, the Federal Power Commission must approve the abandonment of the natural gas line by El Paso Natural Gas, provided the results of the environmental study indicate that such action would be appropriate and lawful. The great majority of Federal permits are relatively routine, and may be issued following final publication of an environmental impact statement. There are several major steps in the permitting process which are not yet complete, including the following:

(1) *Department of the Interior (DOI): EIS*

As lead agency, the DOI completed a draft EIS on all aspects of the Sohio project in November 1976; the final EIS is now expected to be completed by the DOI in May 1977. After the 30-day review period which follows final publication of the EIS, action on required permits could begin.

(2) *Federal Power Commission (FPC): El Paso Abandonment Proceeding*

Hearings concerning the abandonment of the El Paso line have been completed with respect to questions raised under the Natural Gas Act. Following the publication of the EIS, the hearings will be reconvened and briefs filed with respect to the environmental aspects of the abandonment. Under normal FPC procedures, an initial decision by the administrative law judge could be expected by late summer, 1977. Following the initial de-

cision, exceptions to the decision would be taken and the record would go to the Commission for a final decision, which would likely occur in late 1977. If certain expediting procedures which have been proposed are approved by the Commission, the proceedings could be completed 2 to 5 months earlier. (See Section VI for discussion of expediting procedures.) Final action on other Federal permits will not begin until after the FPC rules on El Paso's pipeline abandonment.

(3) *Environmental Protection Agency (EPA): Permits to Construct and Operate New Sources of Air Emissions*

Sohio's proposed marine terminal would be located in Long Beach, within California's South Coast Air Basin (SCAB). Air pollution in the SCAB exceeds the ambient air quality standards set by EPA under the Clean Air Act for all five "criteria pollutants." EPA has therefore designated the SCAB a non-attainment area with respect to these pollutants. Under an EPA policy announced in December 1976, permits for the construction and operation of large new sources of air emissions in non-attainment areas can be granted under stringent conditions which require, among other things, that sufficient offsetting emissions from existing sources be reduced so as to more than compensate for the emissions attributable to the new sources.

Where a State has promulgated new source review regulations that are at least as strict as EPA's guidelines, the EPA approves a State's regulations and permits it to take over the program. California's regulations are currently being reviewed, and EPA expects to decide upon delegation of new source review authority to California at some time in the future. Regardless of whether or not the State receives this authority, however, under

California State laws (which are not preempted by the Clean Air Act) the project would have to receive approval from the Southern California Air Quality Management District. This approval, in turn, is subject to review by the California Air Resources Board. The trade-off standards applied by these State agencies are similar to those enunciated in the EPA's policy statement.

Matters to be resolved before these agencies can proceed with permitting action include several areas in which new information and policy needs to be developed. These include:

—Air emissions associated with tanker operations;

—Measures to minimize these emissions, including tanker equipment and operational requirements;

—Authority and jurisdiction of State officials, EPA and/or and the Coast Guard to regulate tanker emissions;

—Criteria for qualification as offsetting emission reductions; and,

—Ways to assure that such offsetting reductions will occur.

State and Federal authorities are currently working closely together with the project's [sic] sponsor to resolve these uncertainties.

(4) *Bureau of Indian Affairs (BIA): Easements and Rights-of-Way*

The BIA is authorized, through the Secretary of the Interior, to grant rights-of-way for the construction, operation, and maintenance of pipelines for the conveyance of oil across any Indian Reservation, or lands held by an Indian tribe. The proposed pipeline will cross the Morongo and Agua Caliente Reservations in southern California.

It is anticipated that most of the needed easements and rights-of-way will be processed and issued as a matter of routine administrative procedure.

(5) *Corps of Engineers (COE): Dredging*

Development of an in-port marine terminal to accommodate Alaskan oil tankers will necessitate dredging and construction along the California coast. Such activity is regulated, not only by the California Coastal Zone Conservation Commission) [sic], but also by the COE and the State and regional Wate Quality Control Boards) [sic]. The COE regulates all construction and dredging in navigable waters, and must issue a permit for the improvements contemplated at the Port of Long Beach.

COE permit applications for the port construction have already been filed, and special procedures can be invoked to reduce processing time. COE permits will be issued in conjunction with DOI after completion of the El Paso abandonment proceeding.

5. *Williams Pipeline Expansion*

a. *Description*

The Williams Pipeline Company, which operates on an existing products pipeline system in the upper Midwest, has proposed a major expansion to transport crude oil from Oklahoma to Minnesota and Wisconsin.

The following five-step program has begun to be implemented:

1. 80,000 B/D under construction.
   4th quarter 1977:

   —123 miles of new 18-inch line from Mason City, Iowa to Rosemount, Minnesota. New power on an existing 12-inch Des Moines-Mason City line, to increase throughput capacity;

   —Add power to an existing 12-inch line from Ponca City, Oklahoma to Sioux Falls, South Dokota [sic], to increase conventional products throughput capacity;

   —Add power to the existing Minneapolis-Superior 8-inch line to provide an additional 10,000 B/D crude capacity to Superior.

2. 120,000 B/D under construction.
   1st Quarter 1978:

   —All of the 80,000 B/D case investment; plus

   —Move crude to existing 16-inch line from Tulsa to the Northern Tier and add power for higher throughput.

3. 190,000-350,000 B/D proposal.

   (No firm schedule)

   —All of the 80,000 B/D case investment; plus

   —Install 503 miles of 24-inch line from Barnsdall, Oklahoma to Mason City, Iowa; provide additional power on 18-inch line from Mason City to Rosemount, Minnesota.

   —Install additional power on Barnsdall-Mason City 24-inch line.

4. Supplement to 2 or 3 above as required:

   —Install 70 miles of 24-inch pipeline from Cushing, Oklahoma to Barnsdall or Tulsa.

Williams has also proposed to power the 8-inch Minneapolis-Superior line to full capacity to provide 10,000 B/D crude capacity to the Superior area.

Although not part of the Williams proposal, additional capacity to supply the Continental refinery at Wrenshall, Minnesota and the Murphy refinery at Superior, Wiscon-

sin could be achieved by looping the present Minneapolis-Superior line. In this supply scheme, the Minnesota pipeline would become idle. Its reversal would provide a means of moving crude to Clearbrook and from there to Wrenshall and Superior.

This pipeline could thus provide 350,000 B/D capacity for crude oil from Oklahoma to Minneapolis, Minnesota.

b. *Pipeline Connections*

An expanded Williams pipeline, as proposed, could receive crude oil from existing Gulf Coast pipelines that connect to the proposed Seadock deepwater terminal near Freeport, Texas. It could also receive oil from pipelines which would connect to the proposed Sohio Pipeline from Long Beach, California, to Midland in west Texas.

c. *Refinery Capacity*

This pipeline could be directly connected to refineries in Minnesota and Wisconsin which have the capacity to absorb approximately 200,000 B/D of North Slope-type crude oil. Refineries in these areas account for around 60 percent of capacity in the Northern Tier States that is most immediately affected by the reduction in Canadian crude oil exports (i.e., classified as Priority 1 under the Canadian Crude Oil Allocation Program).

d. *Allocation of Benefits of Alaskan Crude Oil*

Direct benefits of an expanded Williams Pipeline would accrue to refiners in Minnesota and Wisconsin. Indirect benefits would be increased availability of products to eastern North Dakota and the upper-Michigan Peninsula.

e. *Permitting Process*

At the present time, permitting is anticipated to present no problems, since existing Williams Pipeline rights-of-way will be utilized. Permitting for the initial phase of the expansion is nearly complete.

VI. *Conclusions and Recommendations*

A. Conclusions Concerning the Equitable Sharing of the Benefits of North Slope Crude Oil, Directly or Indirectly, By All Regions of the Country

The most logical market for North Slope crude oil in the United States is the West Coast market, and it is likely that if refinery capacity for Alaskan type crude were sufficient on the West Coast to absorb the North Slope production, none of the proposed projects for moving Alaskan crude oil to the central United States would have been proposed. As a result of the projected surplus of crude oil on the West Coast and demand in other parts of the country, there are several proposals to construct permanent transportation systems from west to east, and it is through one or more of these systems that the purposes of Section 410 can be satisfied. It is readily apparent that the three northern pipeline projects proposed to move oil directly into the Northern Tier area are designed to serve essentially the same market areas, and, therefore, the construction of only one of those projects may be feasible. None of these projects would compete directly with the Sohio proposal in other than the Chicago market, although other portions of the upper Midwest and the Northern Tier could conceivably be served also by the Sohio project via a tie-in with the Williams system.

The Sohio project, combined with one of the projects designed to serve the Northern Tier, would provide the most direct means of achieving equitable distribution of Alaskan crude oil to those areas of the country which can economically use it. However, any project which provides a means of delivering Alaskan oil to the major refining and distribution centers east of the Rocky Mountains would indirectly benefit all areas of the country. Because the distribution systems for crude oil and petroleum products in the eastern United States are an integrated network, delivery of Alaskan crude oil to Chicago, the Mid-Continent area, or the Gulf Coast could result in

a reduction of imports, and would reduce the vulnerability of the eastern United States to embargos.

B. Specific Conclusions with Respect to the Sharing of the Benefits of Alaskan Crude Oil by the Northern Tier States

As discussed above, the Northern Tier States could directly benefit from any of the three northern proposals designed to connect with the Interprovincial and Lakehead Pipeline systems. While none of the proposals directly serves all refiners in all of the Northern Tier States, each could, with the construction of relatively short pipeline connections in addition to the major route, serve all portions of the Northern Tier. Regardless of whether such additional facilities are constructed, however, each of the three pipeline proposals provides a direct route for Alaskan oil to most of the Northern Tier.

The Sohio project could provide, via interconnecting pipelines, a link, albeit less direct, to the eastern half of the Northern Tier States. There are also potential indirect benefits, in the form of product shipments, to portions of the Northern Tier, from Alaskan crude oil which might be delivered to Midland, Texas. Alaskan crude oil delivered via the Sohio project to either Midland or the Gulf Coast could indirectly benefit the Northern Tier States east of Minnesota during an embargo, by replacing imports that would otherwise be diverted from the Gulf Coast. Thus, imported oil now shipped to Chicago via the Capline route could be replaced by Alaskan crude oil.

Finally, although each of the systems is capable of delivering Alaskan oil to some or all of the Northern Tier States, it is not presently clear to what extent Alaskan oil would be delivered to parts of this market, even if a pipeline route were provided. Alaskan crude oil delivered via any of these routes would have to be competitive with indigenous crude oil in parts of the Northern Tier, or with oil brought from other areas.

C. Impact of Delivery Systems on Reducing the Dependency of New England and the Middle Atlantic States on Imports

None of the proposed delivery systems serve New England or the Middle Atlantic States directly, and it would not appear to be economic to ship Alaskan crude oil by tanker directly to refineries on the East Coast. Thus, none of the proposals provides a direct benefit to these areas. However, Gulf Coast refineries supply a large percentage of the petroleum products consumed in New England and the Middle Atlantic States. To the extent that the Gulf Coast refiners were able to receive Alaskan crude oil by tanker or via pipeline from the West Coast at a price which would be competitive with imported crude oil, the New England and Middle Atlantic States would benefit by receipt of products refined from Alaskan crude. More significantly, in the event of an embargo, the existence of these transportation systems would provide a means by which Alaskan crude oil could continue to be delivered to the Gulf Coast to compensate for reduced imports, or to the Chicago area to replace Permian Basin (west Texas) crude oil which could then be moved in greater quantities to the Gulf Coast refineries which serve the Northeast with petroleum products. Thus, the existence of any west-to-east transportation system would operate to assure the equitable allocation of petroleum products to the Middle Atlantic and New England areas.

D. Conclusions Concerning Specific Provisions of Law Relating to Permits Required from Any Federal Officer or Agency, Which Would Tend to Inhibit Expeditious Construction of a Delivery System

1. *Permits Required*

Although numerous Federal permits are required for the construction of all of the projects except Kitimat (which requires permission from Canadian authorities),

most of these permits should not seriously inhibit construction if they are expeditiously applied for by project proponents.

However, because of the nature of these proposals, all of which require construction or expansion of marine terminal facilities and extensive construction and/or modification of pipelines, there are two Federal processes which necessarily require a substantial period of time to complete:

a. *Analysis and Consideration of Environmental Consequences*

The preparation of an Environmental Impact Statement (EIS) can be a lengthy process. Because of the length of pipeline routes and the potential for environmental impacts along the entire route, and because of public concern with respect to oil spills, the environmental review of pipeline and terminal proposals must be an extensive one.

Of the projects which may require an EIS, only Sohio and Northern Tier have applied for the Federal permits resulting in an environmental review leading to the preparation of an EIS. The Sohio EIS process is expected to be completed by June 1977.

The proponents of the Trans-Mountain Reversal project have not yet applied for any Federal permits. With respect to the Northern Tier project, it is the intention of the Department of the Interior to expedite the EIS preparation to the extent practicable when such permits are in fact applied for. Nevertheless, DOI estimates that the process will require at least one and a half years to complete.

Proponents of the Trans-Mountain Reversal do not consider the one Federal permit which they say is necessary (a permit from the Corps of Engineers to add a berth to ARCO's present Cherry Point terminal) to be a major Federal action which could have a significant

impact on the environment, and therefore argue that an EIS is not required. In any event, such permit has not yet been applied for, so the question of whether an EIS will be required has not yet been formally presented, much less resolved.

b. *Permits to Construct and Operate New Sources of Air Emissions and Wastewater Discharge*

All three of the proposed U.S. projects for west to east pipelines are presently involved in controversies concerning the operation of new or expanded marine terminals.

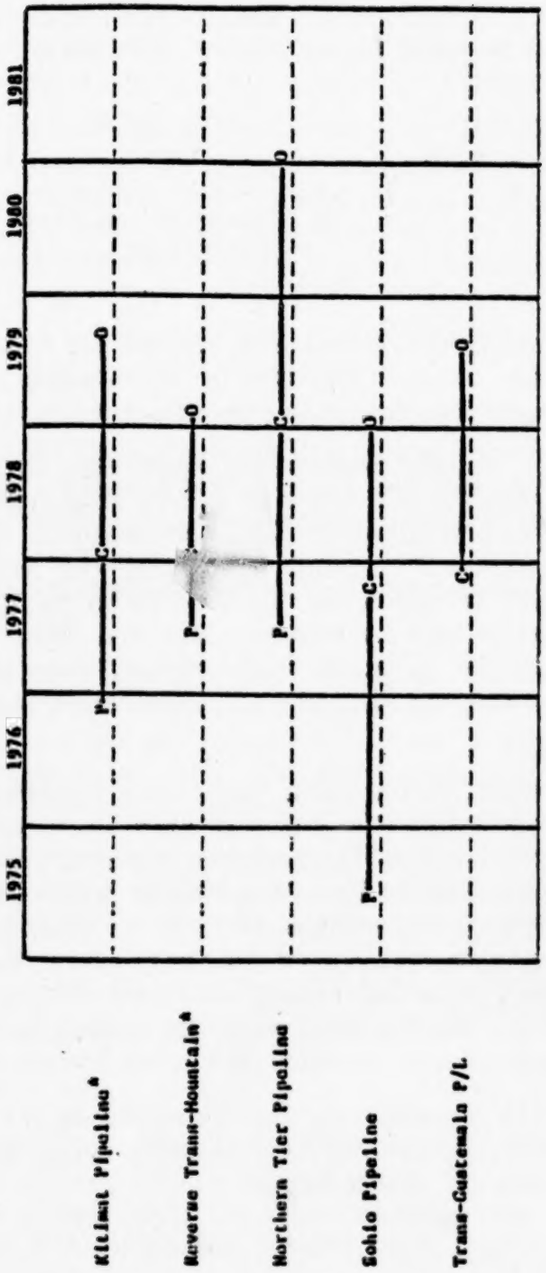
The two proposed projects in Washington State must be certificated by the State as EPA's delegate for Air Emission and Wastewater Discharge permits. Substantial environmental questions concerning the location of the proposed terminals are expected to be raised at the hearing which will be held on these and other permits required by the State. It would appear, therefore, that permitting may be delayed until these issues can be resolved.

With respect to the Sohio application, it appears that there may be substantial delays in final action concerning the air emissions at the proposed terminal facility at Long Beach. Most of that delay will be in the State permitting process, rather than with EPA, which still has new source emissions review authority under the Clean Air Act in California. In addition, final FPC action on the El Paso abandonment may not take place before December 1977.

Table XIV provides approval timetables on the various projects, as estimated by their sponsors, along with estimated construction schedules.

Table XIV

Earliest Estimated Approval and Construction Time



P Earliest application for Federal environmental study or major Federal permit.
C Earliest start of construction.
O Earliest start of operation.
* Canadian Government action.

Source: Sponsors' reports as modified by current permit approval status.

2. *Expediting Procedures Taken to Date*

In response to the mandate contained in Section 18 of the ANGTA, certain actions have been taken by the Federal Government to expedite permitting actions on the various projects, as follows:

a. In view of the fact that numerous Federal and State agencies are involved in the permitting process for the projects, on March 1, 1977, a Federal Project Coordinator was appointed by the Administrator of the Federal Energy Administration to coordinate the activities of all the various governmental agencies and private parties that have an interest or responsibility in the distribution of Alaskan oil and to assure that each agency or party is aware of the scope of its responsibility and is moving ahead in a timely manner to fulfill it. All Federal agencies, the private parties and the State officials involved have agreed to cooperate fully with the Project Coordinator.

b. Although no formal application has yet been filed, the Department of the Interior, which will have lead responsibility for the preparation of an EIS with respect to the Northern Tier project, has begun discussion of the form of the submission of environmental data with the project's proponents, in order to assure that the submission is complete and can be reviewed expeditiously when it is filed.

c. The Maritime Administration is expediting the publication of regulations concerning the transfer of CDS and ODS tankers to the domestic trade, and anticipates that final regulations can be in effect by the end of May.

d. The staff of the Federal Power Commission, in an effort to expedite the proceedings with respect to the abandonment of the El Paso Natural Gas Pipeline, for the Sohio Project, has filed a motion with the Commission to eliminate the requirement for an initial decision by the

Administrative Law Judge in the case. If this motion is approved, it could result in a decision by the Commission 2 to 5 months sooner than would normally be expected, and a final decision could occur by the late summer of 1977. The motion is generally supported by most of the parties in the proceeding, but elimination of the initial decision is unusual and may be challenged. The Commission has been urged by the Administration that, if it cannot grant the motion to eliminate the initial decision, it will employ other means to expedite the final decision to the maximum extent practicable.

E. Conclusions and Recommendations With Respect to Whether Special Expediting Procedures Are Necessary to Insure the Equitable Allocation of North Slope Crude Oil to the Northern Tier States, to Carry Out the Provisions of Section 410 of P.L. 93-153.

While it is apparent that the permitting process for each of the three proposed delivery systems will affect construction, there are several reasons for concluding that special expediting procedures, beyond those that will be taken under the mandate to Federal agencies contained in Section 18 of the ANGTA, are not appropriate at this time.

1. *There Are Significant Environmental Questions Involved in Each of the Projects Which Have Not Yet Been Sufficiently Defined and Analyzed*

When the Congress passed the Trans-Alaska Pipeline Authorization Act in 1973, it did so only after the environmental questions which were raised concerning the construction of the pipeline had been thoroughly studied. The legislation did not short-cut the EIS preparation process, but instead limited legal challenges to that process after it was completed. In passing the Act, the Congress effectively provided for appropriate environmental

safeguards, and was able to do so as a result of the environmental review that had already taken place.

Similarly, the Alaska Natural Gas Transportation Act did not foreclose full environmental review of each of the proposed Alaska gas pipeline routes. The Act specifically contemplates that an EIS will be done in the usual way for each project, and only after completion of such EIS will judicial review be limited. No environmental review under NEPA has been begun, much less completed, on the question of potential oil pollution in Puget Sound and other environmental questions which affect the Northern Tier and Trans-Mountain Reversal proposals. With respect to the question of water and air quality in the Los Angeles Basin, as well as other environmental issues, which affect the Sohio proposal, a final EIS has not been issued. Environmental aspects of each of these projects are also being scrutinized closely by State agencies which have permitting authorizations.

Environmental concerns are matters of grave importance to the citizens of the States and localities involved. As long as useful efforts to resolve them are taking place, those efforts should be allowed to continue pursuant to the procedures established in the National Environmental Policy Act of 1969.

2. *The Federal Environmental Review and Permitting Process Will Not Likely Extend Significantly Beyond the Review Period That Will Be Required By the Respective States That Will Be Transitted Under Each Proposal*

Under existing law, most of the States that will be crossed by each of the proposed pipelines, and particularly the States of Washington and California, which

would serve as marine terminal sites, have their own environmental review and siting responsibilities that are not preempted by Federal law. For example, as noted above, the Washington State Energy Facility Site Evaluation Council must hold public hearings and otherwise review the environmental and other impacts of the Trans-Mountain Reversal and Northern Tier proposals before they can be constructed. The State review process for each project could well take as long as and proceed simultaneously with the Federal Government's preparation of an EIS. In California, the completion of the Federal EIS has proceeded simultaneously with the preparation of an environmental impact report required under the California Environmental Policy Act. Similarly, the EPA's review of new source emissions from the Sohio marine terminal is proceeding simultaneously with and will probably not take longer than a similar review by California's Air Resources Board and the Southern California Air Quality Management District. While the FPC's abandonment proceeding may require another 8 months, the California Public Utilities Commission's abandonment proceedings for the intrastate portion of the gas line Sohio proposes to use will take about the same length of time, assuming an application for such abandonment is filed in the near future.

Thus, unless legislation to expedite the Federal permitting process also preempted State regulatory authority over the projects in question, little if any time would be gained by such legislation. In view of the interests the various States have in these projects and the potential adverse effects these projects may have on the local citizens unless mitigating measures are imposed, it is not recommended that Federal legislation preempt the existing authority of the States to make vital decisions concerning their own environmental quality.

3. *For Most of the States in the Northern Tier, There Exist Reasonable Means of Assuring an Adequate Supply of Petroleum Products While Long-Term Delivery Systems for North Slope Crude Oil Are Being Considered*

The FEA's preliminary analysis of crude oil and petroleum product supply for the Northern Tier States through 1980 indicated that even without significant actions being taken by the Federal Government, there would be no shortfalls of petroleum products during that period in most of the Northern Tier States. A potential reduction in the supply of light crude oil to refineries in Montana could result in a product shortfall in Montana and eastern Washington. Without extensive modifications, Montana refineries cannot utilize any additional volumes of heavy crude oil over the amount which is and will be available from local U.S. sources.

To the extent serious shortages might develop in some parts of the Northern Tier, there are several means of alleviating the problem that are being actively pursued, including the possibilities for increased exchanges of crude oil other than Alaskan with Canadian refiners, studies of the prospects for making increased volumes of indigenous local crude oil available to Northern Tier refineries, and modifications to the Canadian Crude Oil Allocation Program to increase its responsiveness to spot or seasonal shortfalls. In addition, unit train deliveries of crude oil to refineries in Montana and other parts of the Northern Tier are being considered by some affected refiners.

There is no intention here to suggest that the problems faced by refiners in these States are not difficult to solve, or that solutions are readily at hand. Rather, it is suggested that interim means of solving the short-term supply problems of some Northern Tier refiners have not

been fully explored and that it is too soon to determine whether diligent efforts on the part of those refiners, as well as FEA, will not produce solutions to these problems.

The supply figures given in this report are necessarily inexact because they are rapidly being overcome by events. Much more will be known about the Northern Tier supply problem in May 1977, when the Canadian government is expected to announce the volumes of exports it will make available to U.S. refiners in 1978. When those figures are announced, the FEA will promptly assess their impact on the Northern Tier supply situation and will report to the Congress immediately on its findings and the extent to which they affect the conclusions reached in this report.

4. *The Existence of Reasonable Short-Term Alternatives For the Disposition of North Slope Crude Oil Allows Time for Public and Private Consideration of a Long-Term Delivery System*

Although it is eminently desirable to develop appropriate pipeline systems for the delivery of crude oil from PAD V to the refining centers east of the Rocky Mountains, there are short-term methods for disposing of North Slope crude oil which will provide substantial benefits to the United States while the private and public consideration of long-term systems proceeds. It is only through this combination of private and public action that systems can be developed that will provide the most equitable and economic means of distributing North Slope crude oil in the United States. The private sector must be convinced of the economic advantage of any one system over competing systems before that system can be financed and constructed.

The public sector, through the permitting process, can ensure that the system, when completed, is safe and environmentally sound. Section 410 of the Trans-Alaska Pipeline Authorization Act and Section 18 of the Alaska Natural Gas Transportation Act require the President to use his powers, to the maximum extent practicable, to assure that the benefits of Alaskan North Slope crude oil are equitably shared by all sections of the country, including the Northern Tier States, and to expedite the Federal permitting process to assure that this purpose is expeditiously carried out. However, it would be inappropriate to suggest that this goal must completely override the environmental safeguards written by the Congress into the Clean Air Act and the National Environmental Policy Act.

Therefore, it is recommended to the Congress that no special expediting procedures be established at this time (other than those already established under the mandate of Section 18 of the ANGTA) with respect to the Federal permitting process for North Slope crude oil delivery systems. If, at a later time, it appears appropriate to expedite procedures in a way that will not compromise the environmental review process, recommendations to that effect will be submitted to the Congress.

PRESIDENT'S APRIL 15, 1977 REPORT TO CONGRESS ON THE PRICING OF ALASKA NORTH SLOPE (ANS) CRUDE OIL

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PRESIDENT'S APRIL 15, 1977 REPORT TO CONGRESS ON THE PRICING OF ALASKA NORTH SLOPE CRUDE OIL

CHAPTER I

EXECUTIVE SUMMARY

A. *Description of Legal Reporting Requirements*

Section 8(g)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), as added by Section 401(a) of the Energy Policy and Conservation Act of 1975 (EPCA), provides that on April 15, 1977, the President is required to submit to the Congress a report as to whether the FEA's crude oil pricing regulations in effect on April 15, 1977, "will provide positive price incentives for the development of the domestic crude oil production [on the Alaska North Slope] without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States." In other words, the report is to assess whether, under current price regulations, Alaska North Slope (ANS) crude oil will have a wellhead price such that it provides positive incentives for production of such oil without affecting other domestic crude oil prices (due to the composite wellhead price requirement of Section 8 of the EPAA) in a manner that would result in less production of other domestic crude oil than would otherwise occur.

If the President's findings are that a price sufficient to provide the necessary incentives for ANS production is so high that when entered in the composite price computation it would affect regulated prices for non-ANS domestic crude oil production in a manner likely to result in less production of such oil than might otherwise occur, Section 8(g)(2) authorizes the President to submit to the Congress, either with the April 15 report or at anytime thereafter, an amendment to the existing

regulations which would exclude from the composite price calculation up to two million barrels per day of ANS crude oil production. Such a proposed amendment must include a provision specifying a ceiling price or prices for the excluded production, such that the average of the proposed ceiling price or prices for ANS production cannot exceed the highest actual weighted average first sale price permitted under FEA regulations for significant volumes of any other classification of domestic crude oil. Such amendment is subject to disapproval by either House of Congress within 15 days of its submission, pursuant to the procedures of Section 551 of EPCA.

If such an exemption and ceiling price amendment is disapproved by either House of Congress, another proposed exemption may be submitted within 30 days. Further such amendments may be submitted not earlier than 90 days after the submission of any previous amendment. If any exemption and ceiling price amendment becomes effective, further amendments to modify the ceiling price(s) applicable to ANS production may not be submitted until January 1, 1978, and thereafter at not more frequent intervals than every 90 days.

B. *Findings*

On the basis of the assumptions used in the analysis, the first sale price of ANS crude at the wellhead appears to be less than the maximum allowable composite price for a period extending through at least June 1978, even under the most favorable assumptions from the producer's viewpoint. After that date, under certain pricing and transportation scenarios, the wellhead price for ANS crude could well exceed the lawful composite and therefore reduce the existing incentives for other domestic production. Seven scenarios are explored. The first three preclude exchanges of ANS crude oil with foreign countries, while the latter four allow them. Under Scenario

I, ANS crude oil is given entitlements treatment such that it sells at a price competitive with that of uncontrolled oil on the West and Gulf Coasts. Scenario II treats ANS crude as competitive with upper tier oil on the two coasts, while Scenario III allows ANS crude upper tier treatment on the West Coast, but import tier treatment on the Gulf Coast. Scenarios IV and V give ANS oil sold domestically uncontrolled and upper tier oil entitlements treatment respectively, but allow exchanges with Japan of 400,000 barrels per day (B/D) of ANS crude oil shipped in U.S. flag vessels. Scenarios VI and VII treat the oil sold domestically as upper tier and uncontrolled oil respectively, but allow 400,000 B/D of exchanged oil to be shipped to Japan in foreign flag vessels.

Three rates of increase in the price of foreign imports are considered. These are based on hypothetical assumptions, for purposes of analysis, that the landed cost of foreign imports will increase at (1) the annual level of U.S. inflation, assumed to be 5.5 percent; (2) 7.5 percent; and (3) 10 percent.

The case which provides the highest level of wellhead receipts is the one which increases the cost of imports at 10 percent, allows the ANS crude to sell as imports, and allows exports in foreign flag vessels. Even under this case the wellhead first sale price remains below the legal composite through the first half of 1978.

It is important to note that where uncertainty exists, the assumption for purposes of this report generally has been to adopt the case resulting in the highest first sale price. Thus, it is assumed that all of the cost savings resulting from exchanges would accrue to the U.S. producers, even though it is possible that some of those savings would be shared with the exchange partner. Also, no weight has been given to the possibility that some ANS crude might be discounted on the West Coast in

those cases where exports are prohibited. If either of these factors occurred, the result would be to reduce the ANS first sale price further below the composite and to delay further the estimated date when the actual wellhead prices might exceed the legal composite.

Finally, the cases treating ANS crude as upper tier have required projections of upper tier prices through 1981. These projections are made on the assumption that the average upper tier price will increase at the same rate as the rate of inflation as measured by the GNP deflator, assumed to be 5.5% through 1981.

The principal assumptions are the following:

1. The analysis covers the period from July 1977 through September 1981, which encompasses the remainder of the period that crude oil price controls can be imposed under current law.

2. ANS production will reach 1.2 million barrels per day by December 1977 and remain at that level through September 1981.

3. ANS crude will be used on both the Gulf and West Coasts, unless exchanges are allowed. The West Coast will absorb all that it can, and the surplus will be shipped to the Gulf Coast. West Coast consumption is assumed to reach 800,000 B/D by July 1978, which is the maximum amount present refinery configurations will allow. If less is absorbed on the West Coast, the likely effect will be lower wellhead prices than indicated herein.

4. The Trans-Alaska Pipeline Tariff will initially be $5.10/bbl. and will remain at that level until the middle of 1980, when it will be reduced to $4.65.

5. Shipments to the Gulf Coast will transit the Panama Canal until an assumed West Coast/Gulf Coast pipeline system begins operation in July 1979.

6. ANS crude will replace imported crude, and be priced on a par with imports.

7. The landed cost of imported crudes will be increased every 6 months, causing ANS crude values to increase by a corresponding amount at the same time.

8. All foreign exchanges are with Japan.

9. All cost savings of foreign exchanges will accrue entirely to the U.S.

10. ANS crude will be priced at the refinery at the level of imports (adjusted for quality) or at the level of upper tier crudes through the actions of the crude entitlements program.

11. ANS crude will be sold on a refinery-delivered basis by the producers. This will result in a range of wellhead netback prices which will reflect the range of transportation costs from the wellhead. To the extent that market forces would cause prices to equalize at the wellhead, wellhead prices will be lower than indicated herein.

There is of course no assurance that all or any of these assumptions will remain valid. However, on the basis of current information the assumptions listed above are considered to be the most appropriate and reasonable assumptions of future conditions. To the extent that alternative reasonable assumptions could have been made, the ones selected for this analysis are those that would result in the highest wellhead prices.

CHAPTER II

CONSIDERATIONS INVOLVED IN PRICING ALASKAN NORTH SLOPE (ANS) CRUDE OIL

A. *Background*

The EPAA, as amended by the EPCA and the Energy Conservation and Production Act of 1976 (ECPA), gives the FEA certain flexibility to control domestic crude oil prices, provided that the national weighted average "first sale", or wellhead, price for domestic crude oil meets certain statutory requirements. First, the weighted average first sale price for domestic crude oil produced and sold in February 1976 was limited to $7.66 per barrel. Second, this weighted average or composite price was allowed to increase at the rate of inflation, as measured by the adjusted GNP deflator, plus an additional 3 percent a year as a production incentive, not to exceed a total of 10 percent per annum.

In August 1976, in the ECPA, Congress allowed the maximum annual increase to remain at 10 percent per annum regardless of the rate of inflation. On March 15, 1977, FEA, in Energy Action No. 11, proposed continuation of the production incentive (i.e., the difference between the rate of inflation and 10 percent) after that date, and that continuation became effective 15 days thereafter when the period of congressional review expired. ECPA exempted stripper well production from ceiling prices but required that it be included in the composite calculation at an imputed price equal to $11.63 plus an amount which represents subsequent changes in the actual composite of upper and lower tier oil prices after August 1976.

FEA initially implemented the provisions of EPCA regarding the composite price by imposing ceiling prices

on domestic crude oil production at two levels or tiers. Lower tier, or "old," oil (i.e., crude oil produced from a particular property in volumes not greater than during the same month of 1972 or old crude oil produced during an average month in 1975, at the option of the producer) was allowed to sell at the highest posted price in the field on May 15, 1973 plus $1.35 per barrel. Upper tier, or "new," oil was permitted to sell at prices equal to the highest posted price in the field on September 30, 1975 (which at that time was an uncontrolled market price), less $1.32.* Since it was assumed that lower tier oil production was approximately 60 percent of all domestic production, it was calculated that the weighted average of upper and lower tier ceiling prices would work out to the $7.66 maximum composite price allowed for domestic production in February 1976.

Since the composite was allowed to increase over time at the rate of not more than 10 percent per annum, FEA allowed the ceiling prices of both lower and upper tier oil to increase gradually to take advantage of the allowable increase in the composite. It turned out, however, that domestic lower tier production was over-estimated and declined at a faster rate than had been anticipated, thus requiring that monthly increases for upper and lower tier prices be postponed for several months, and in two cases upper tier prices were actually lowered. FEA's history of implementing the composite pricing requirements of the EPCA is detailed in its February 15, 1977

* Crude oils of course vary in quality and therefore sell in a free market at varying prices to reflect, among other things, quality differentials. By adding or subtracting a fixed amount to the market prices at which crude oil sold on a certain base date, FEA's ceiling price regulations reflect these quality differentials, since they are reflected in the market prices from which the ceiling prices are derived. Quality differentials have in some cases changed over time, particularly for heavy California crude. These quality differential changes have also been reflected in FEA price regulations through specific amendments.

and March 15, 1977 reports to Congress that accompanied Energy Action No. 11.

An important point to note about FEA's ceiling price rules and about the calculation of the composite price is that both are based on "first sale" prices, which are defined in the Conference Report on the EPCA as being actual or imputed wellhead prices, exclusive of transportation costs. This is of considerable significance in regard to ANS crude prices, since, as will be discussed in detail below, transportation costs associated with bringing ANS production to refining markets will be considerably higher than those associated with any other domestic or foreign supply of crude oil.

B. *The April 15 Report on Alaskan North Slope (ANS) Production.*

Section 8(g)(1) of the EPAA requires the submission of a report to Congress on April 15, 1977, on whether the FEA price and allocation regulations "will provide positive price incentives for the development of" ANS production "without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States". The effect of this provision is that the President must advise Congress on April 15, 1977 of his judgment as to whether ANS oil wellhead prices will be above or below the national legal composite price and therefore would have the effect of increasing or decreasing the actual composite. The apparent concern on the part of Congress reflected in this section is that North Slope wellhead prices would be above the composite, thereby requiring offsetting adjustments in the prices of other domestic production and thus reducing the incentives for such production.

It is for this reason that Section 8(g)(2) of the EPCA gives the President the discretion to propose a regulation excluding wellhead prices of up to 2 million barrels of

ANS crude per day from the calculation of the composite if he finds that their effect on the composite would be to reduce incentives for other domestic production. If he elects to exclude ANS crude from the composite calculation, he must establish a ceiling price or prices for such ANS crude such that the average of such ceiling prices does not exceed the highest average first sale price permitted under FEA regulations for any significant volumes of any other classification of domestic crude oil. These provisions would become effective only if they have not been disapproved by either House of Congress within 15 continuous days of congressional session after they have been proposed by the President.

C. *Factors Relating to the Effect of ANS Crude on the Domestic Price.*

The effect that ANS crude will have on the composite price for domestic crude depends on (1) the prospective levels of first sale prices for ANS crude during the remaining statutory period of price controls, and (2) the prospective levels that first sale prices for non-ANS crude oil production would reach during the same period if ANS production were not included in the calculation of the composite. If, on the one hand, ANS crude should receive a first sale (wellhead) price which is less than the maximum legal composite price in any month, the inclusion of ANS crude in the calculation of the actual composite price would result in a lowering of the actual composite price. While there is no requirement that it be done, this would give the President the flexibility to adjust ceiling prices on non-ANS production so as to increase incentives for that production equal to the difference between the actual ANS first sale price and the legal composite that would otherwise occur in the same month, times the volume of ANS crude produced and sold during that month.

Conversely, if the actual first sale price of ANS crude exceeds the maximum legal composite price in a month, then the actual composite would be increased. In that event, unless ANS production were excluded from the calculation of the composite, ceiling prices on non-ANS production would have to be reduced such that total revenues on such production would be reduced by an amount equal to the amount the ANS crude wellhead price exceeded the maximum legal composite price times the volume of ANS crude produced and sold during that month.

Given this operation of the composite price mechanism, and if the ANS crude is not exempted from the composite, the actual first sale prices for ANS production can have a significant effect on the levels and availability of all other controlled domestic production.

The addition of the large volume of ANS crude to the U.S. crude supply could also cause changes in the prices of other domestic crudes, particularly those produced and used in Petroleum Administration for Defense (PAD) District V, which encompasses the West Coast, Alaska and Hawaii. The Trans-Alaskan Pipeline Act requires that ANS crude be used only in the United States, unless an exception is found by the President to be in the national interest and is not disapproved by the Congress. The ANS volume will be greater than the quantity now produced in PAD-V, and about equal to the quantity imported into that region, as will be discussed in Chapter V. In the absence of regulations, the surplus supply created by ANS crude would tend to force prices of ANS and all other PAD-V crudes to lower levels. Stability would be reached when other markets absorb the PAD-V surplus, and supply and demand of the ANS crude is balanced with the supply and demand for the other domestic crudes and the imports. This balance will most likely be realized at prices below current levels. Lower market prices in California might

conceivably cause some existing non-Alaska West Coast production to be shut-in.

D. *Factors Affecting the First Sale Price of North Slope Alaskan Crude Oil.*

As noted above, the statutory composite price limitations apply to the "first sale" of domestic crude oil. The first sale normally but not always occurs at or near the wellhead. The Conference Report on the EPCA indicates Congress' determination that in order to provide equivalent treatment to all production, the first sale for purposes of the composite calculation is one which either occurs or is imputed to occur at or near the wellhead and one which therefore excludes cost of transportation of crude oil beyond the lease or unit from which it was produced. This legislative history thus makes it clear that the "first sale" price of ANS production, for purposes of determining its effect on the composite, is to be determined prior to its entry into the Trans-Alaskan Pipeline, even though no actual sale may occur until the oil reaches a refinery several thousand miles distant.

As will be shown in detail below, even if ANS production is allowed to be priced competitively with imports, the imputed first sale or wellhead price of ANS crude production is, at least initially, likely to be substantially below the upper tier price level, principally because of the high cost of transportation to West Coast and mid-continent markets. Some of the other factors that will affect the wellhead price of ANS crude oil are: (1) the delivered costs at various refineries of alternative imported crudes likely to compete with ANS crude; (2) quality differences between ANS crude oil and the crudes likely to be displaced by it; (3) differences in refinery location and technological configuration; and (4) the entitlements treatment that determines refinery crude oil acquisition costs. The effect of each of these factors will be discussed in subsequent chapters.

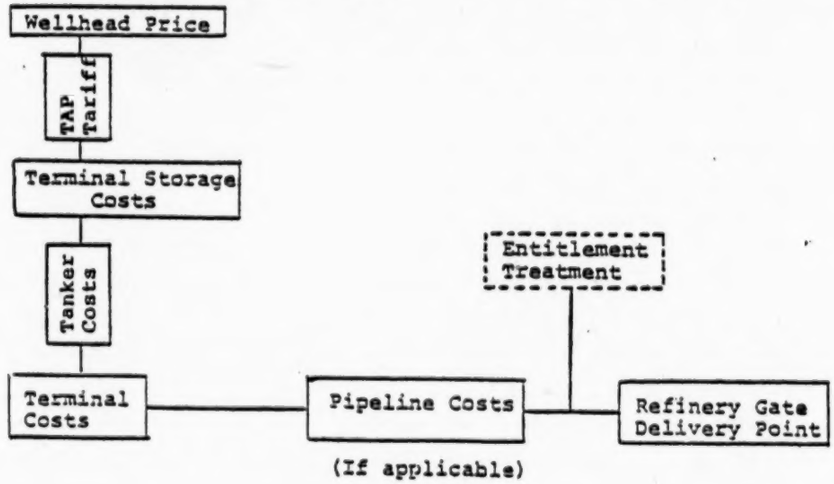
The first sale price of ANS crude will be established in the market place within the constraints imposed by FEA. FEA will have to assign the ANS crude to one or more ceiling price tiers. These could be one of the three existing tiers, (uncontrolled, upper and lower) or even a fourth new tier. A similar assignment to the same or another price tier will also have to be made for purposes of establishing ANS crude's entitlement value. This fixes the value level at which the ANS crude will be bought. Each refiner will then assign a quality differential to the ANS crude, to set the cost that that particular refiner will be willing to incur for ANS crude given his individual capability to refine it. The negotiations of sellers and buyers will then set the market price.

The wellhead price is the market price less the costs of transportation from the wellhead to the market. In this analysis, the domestic market points for ANS crude or the crude for which it is exchanged are assumed to be the West Coast and Gulf Coast ports, and the foreign market point under the exchange options is Japan. Both ocean and Trans-Alaska Pipeline (TAP) tariffs are subtracted from the market prices to obtain the wellhead prices. The netback to the wellhead will be different for each port. In this analysis, the netbacks from the three West Coast markets (Puget Sound, San Francisco and Los Angeles) are calculated and averaged to obtain a single netback figure for the West Coast.

The factors affecting North Slope wellhead prices are depicted graphically in Figure 1.

Figure 1.

FACTORS AFFECTING ALASKAN NORTH SLOPE CRUDE PRICING



CHAPTER III

REFINERY LOCATION AND TECHNOLOGICAL CONFIGURATION

A. *Refinery Location*

ANS crude is not likely to sell at the refinery gate at a delivered price (after taking into account relative entitlements benefits) that is uncompetitive with alternative sources of supply, which will be in most cases imported crude of similar quality. Since the most common substitute crude, a representative Persian Gulf light, sour crude (used herein as the reference crude),* has approximately equal transportation costs to the U.S. East, Gulf, and West Coasts (relatively small differences will be indicated below), it can be expected that ANS production will also sell at all these locations at approximately the same price.

* See discussion of crude quality differentials in Chapter IV.

Therefore, increases in transportation costs for ANS production delivered to various points will not likely cause delivered prices to increase, but instead will be "netted back" to the wellhead, with higher transportation costs resulting in lower wellhead prices. This makes the location of a refinery capable of utilizing ANS crude crucial in determining wellhead prices for ANS production. Transportation Costs [sic] to West Coast refiners will generally be lower than transportation to refiners in the interior, since in the latter case additional tanker or (when they become available) pipeline tariffs will have to be added to the cost associated with bringing ANS crude from Valdez to the West Coast. Thus, assuming all ANS crude is disposed of within the U.S., producer revenues will be less from sales to Gulf Coast and interior refiners than from sales to West Coast refiners.

Hence, assuming North Slope producers will be able to sell their crude to refineries at prices competitive with imports of Persian Gulf light at all locations, the incentive will be to sell ANS crude at those locations where transportation costs will be lowest and wellhead prices will consequently be higher.

B. *Nature of Refineries*

Several technical factors affect the price a refiner is willing to pay for a specific crude. Crude oils differ in the yields of various refined products which can be produced from them. Based on the values of the products which can be produced from a crude in its refineries and its processing costs, a refiner determines the price to be paid for a specific crude. This price may change over time, since the value of the various products produced by the refiner may change due to seasonal demand, new environmental restrictions or other factors. The values of some products, such as residual fuel oil, may tend to reflect the price of bituminous coal and the availability of natural gas, where these products are substitutable.

In addition to the products which can be produced, the value of a specific crude to an individual refiner is a function of that refiner's particular technological and crude oil supply configuration. For example, a refiner possessing extensive disulfurizing facilities and able to sell elemental sulfur may be willing to pay more for intermediate or high sulphur (sour) crudes, such as ANS crudes, than those refiners not having such technology, since he has considerable flexibility in using it. A refiner with no desulfurization capabilities can purchase sour crude only up to the volume that can be blended with low sulphur crudes for optimum profitability. Once that point is reached, incremental volumes of sour crude become less valuable to the refiner, in proportion to the decreased revenues realized from utilizing sour crude.

CHAPTER IV

QUALITY DIFFERENCES BETWEEN NORTH SLOPE ALASKA CRUDE OIL AND IMPORTED OIL

Analyses of West Coast refining capacity and refinery change capability indicate that in 1978, the first full year of production from the North Slope, the principal crude oils "backed out" of refinery utilization on the West Coast will be Persian Gulf light and intermediate crude oils. Some sweet high gravity Indonesian crude oil will also be displaced there because of greater utilization of onstream and new desulphurization capacity.

As noted above, the most representative foreign crude oil for pricing comparison to North Slope crude oil is considered to be Persian Gulf light crude. This conclusion is drawn from the fact that many refiners have identified it as the crude oil they would likely displace with ANS crude and also from a comparison of the

characteristics of the respective crude oils, as shown below:

	Prudhoe Bay (Sadlerochit)	Persian Gulf light (Imported)
Gravity, Degree API	27	34
Sulphur Content	0.97%	1.80%
50% True Boiling Point	685°F	600°F
Residuum (1000 F)°	21.7%	19.0%

Largely because of the somewhat higher volume of low-value residuum that would be produced from ANS crude oil, it will likely have a refinery gate value on the West Coast ranging from $0.10 to $0.40 per barrel (depending on refining configuration) below that of Persian Gulf light sour crude. For ease of computation, it will be assumed in this analysis that the average value for ANS crude is $0.25 per barrel less than Persian Gulf light crude on the West Coast.

For the Gulf Coast, analyses of imported crude oils indicate that the Persian Gulf light crude will again be the crude oil primarily backed out by ANS crude oil. The secondary crudes backed out on the Gulf Coast by ANS crude will be low-gravity, sour crudes, rather than Nigerian or other sweet crudes. As a result of higher utilization of desulphurization equipment on the Gulf Coast for which investment has already been made, ANS crude will likely have a relative value vis-a-vis Persian Gulf light that is somewhat higher than it will have on the West Coast. It is predicted that the quality differential there will be approximately $0.10 per barrel.

The quality of the reference crude, Persian Gulf light, is somewhat below that of the average crude imported into the United States. Moreover, since the shipping charges from the Persian Gulf to the United States Gulf Coast are slightly more than to the West Coast, the differential tends to be more pronounced on the West

Coast. These factors together account for the fact that Persian Gulf light crude is $0.50 less on the West Coast than the national average cost of imported crude, and is $0.35 less on the Gulf Coast. These figures, when added to the quality differentials between Persian Gulf light crude and ANS crudes, lead to the conclusion that ANS crude will be valued at $0.75 and $0.45 below the national average import cost on the West Coast and the Gulf Coast, respectively.

CHAPTER V

SUPPLY AND DEMAND PAD DISTRICT V

FEA has done extensive work to forecast supply and demand for crude oil in Petroleum Administration for Defense (PAD) District V, encompassing the western states of the U.S. Several tables summarizing its findings and estimates form the basis of the discussion in this chapter.

For purposes of this analysis it is instructive to compare the first quarter of 1977 with the same quarter of 1979. During the first quarter of 1977, forecasted crude imports into the West Coast remain close to the peak reached in the third and fourth quarters of 1976. By the corresponding quarter of 1979, there will have been one year to adjust to the flow of North Slope crude at this first plateau rate of 1200 MB/D.

The table below abstracts a few of the most important variables.

OVERALL CRUDE UTILIZATION *
DISTRICT V
(thousands of barrels/day)

	1st Quarter 1977	1st Quarter 1979
Supply		
Production		
North Slope	—	1200
Other PAD V	1126	1146
Total	1126	2346
Imports	1116	523
Total	2242	2869
Demand		
West Coast Refinery Receipts		
North Slope	—	800
Total	2242	2469
West Coast Products Consumption	2360	2670
West Coast Crude Excess		
(called "Interdistrict Shipments")	(25)	400

* Many items are omitted in abstracting the variables with the result that totals do not necessarily balance. For example, this table does not show a net *inflow* of crude into District V from other districts early in 1977. By 1979, the gross inflow from other districts will fall drastically and the outflow rises from 25,000 barrels/day to an estimated 400,000 barrels/day.

In effect, the current forecast says that the 800 MB/D of North Slope crude used in the West is accounted for by a combination of substitution for foreign crude and increased refinery runs over the current level. At the higher level of refinery runs, imports are less than they otherwise would be by over 600 MB/D, this much having been replaced by ANS crude.

Underlying this degree of substitution in place of crude imports is the assumption that ANS crude will be priced on the West Coast by the North Slope producers at a price that will back out all imports of a grade and quality for which ANS is a viable alternative. Since, as noted above, sale of ANS crude on the West Coast

will provide the highest return at the wellhead, all other things being equal, it is reasonable to assume that North Slope producers will price their oil so as to place as much of their production there as possible. Not all imports will be backed out, however, because many West Coast refineries must have access to oil that is lighter and/or sweeter than that which is available on the North Slope.

A breakout of the expected ANS crude distribution to the major refinery centers in PAD V is shown in the following table.

REFINERY RECEIPTS, PAD V, 1st QUARTER, 1979
(MB/D)

Puget Sound		
North Slope	125	
S. Alaska	15	
Imports	193	
Total		333
San Francisco Area		
North Slope	278	
California & S. Alaska	345	
Imports	102	
Total		725
Los Angeles Area		
North Slope	397	
California & S. Alaska	576	
Imports	168	
Total		1141
Other PAD V		
North Slope	—	
California & S. Alaska	210	
Imports	60	
Total		270
Total West Coast Refinery Receipts *		2469
Excess to West Coast		400
Total		2869

* Includes Nevada, Arizona, and Utah.

CHAPTER VI

IMPORTED CRUDE OIL PRICES

If ANS crude is allowed under FEA pricing and entitlements program rules to sell at the refinery gate at prices competitive with imports, changes in the price of imports over time will affect the delivered prices domestic refiners will be willing to pay for substitute ANS crude. If transportation costs remain relatively fixed, fluctuations in the delivered price for ANS crude will be reflected as well in the wellhead price, which in turn will change the impact ANS wellhead prices will have on the composite. Thus, changes in import prices could have a significant impact on incentives for production in the lower forty-eight states if ANS crude is included in the computation of the composite price.

The foreign import price for crude oil has ranged between $12.43 and $14.92 per barrel since November, 1974. In view of the fact that import prices are influenced principally by the decisions of the Organization of Petroleum Exporting Countries and U.S. tariffs, it is difficult to predict the future course of such prices. Hopefully, they will not experience in the future the large increases of recent years. However, for purposes of this report and in order to determine a range of possible fluctuation in ANS prices, it is assumed herein that, for the first half of 1977, prices for imports will have risen 7 percent over 1976 levels (to $14.45 per barrel, which generally reflects the weighted average of the OPEC price increases announced in December 1976) and that thereafter OPEC will raise prices on July 1 and January 1 each year at a rate equal to the U.S. inflation rate. This inflation rate was estimated to be 5.5 percent annually as was used in the 1977 National Energy Outlook. Higher rates of 7.5 and 10 percent are also

used in this analysis in order to provide a range. Thus, the range of import prices is hypothesized as follows.

AVERAGE IMPORTED CRUDE OIL PRICE *

	$ per Barrel		
	5.5%	7.5%	10%
1st Half 1977	$14.45	$14.45	$14.45
2nd Half 1977	14.84	14.99	15.17
1st Half 1978	15.28	15.55	15.93
2nd Half 1978	15.68	16.14	16.73
1st Half 1979	16.11	16.74	17.56
2nd Half 1979	16.55	17.37	18.44
1st Half 1980	17.00	18.02	19.36
2nd Half 1980	17.47	18.70	20.33
1st Half 1981	17.95	19.40	21.35
2nd Half 1981	18.44	20.13	22.42

* Including Import Fee.

CHAPTER VII

TRANSPORTATION COSTS

A. *Trans-Alaska Pipeline*

The Trans-Alaska Pipeline (TAP) is an undivided interest, joint-venture, common carrier, subject to the jurisdiction of the Interstate Commerce Commission. As an undivided interest line, each participant may file a tariff for its share of the total capacity of the line, or a common tariff may be filed by the group. In either event, it is generally expected that the tariff rates will be similar for all participants.

ICC regulations require the tariffs to be filed ten days prior to the date of first input of crude oil to the line. Formal regulatory jurisdiction over the line is considered by the Commission to start as of the date of tariff filings.

The level of initial tariffs will be established by the participants, subject to review by the ICC. Affected parties may challenge the tariffs during the ICC review process and the State of Alaska has already filed papers with the Commission indicating such an intent.

An ultimate finding by the ICC which modifies the filed tariffs may result in refunds to shippers for the prior period if the tariff is found to be higher than that permitted by ICC regulations.

The ICC established, in 1940, that a return on valuation of 8%, before payment of interest charges on long term debt, but after taxes, was reasonable and proper for crude oil pipelines. However, an additional constraint on tariffs was established in 1941 in the Consent Decree negotiated by the U.S. Department of Justice. This allows the annual distribution of up to 7% of the pipeline valuation to the shipper-owners of the pipeline. It has been the practice in the oil industry to establish rates on crude pipelines in accordance with the Consent Decree. These rates have not been challenged before the I.C.C. and have remained in effect. Since this has been the case, the Consent Decree methodology has been used in developing the rates used in this analysis. These are to be considered as reasonable estimates of the initial tariff proposals that will be submitted by the TAP owners to the ICC. The I.C.C. is, in fact, reconsidering its procedures in light of the William's Brothers case, but it may be several years before the Commission adopts any rate-making procedure changes, which in any event cannot be predicted.

Reflecting the requirements of the Consent Decree and the actual ultimate construction cost of the line (now estimated at $9 billion), the estimated "fair value" and allowable return, the estimated level of operating costs, fixed charges, taxes, etc., and the projected thruput of the line, it is estimated that the Trans-Alaska Pipeline par-

ticipants will submit initial tariffs in the range of $4.75 to $6.15 per barrel and, most probably, approximating $5.10 per barrel. These tariffs are expected to cover the period from start of operations through June 1980. Using the same bases, a lower tariff of approximately $4.65 per barrel should be proposed for the next two year period.

Each tariff level is based on a different set of assumptions. The assumptions used in these tariff projections reflect the current best estimates and the practical po-

TABLE VII-1

TRANS ALASKA PIPELINE SYSTEM

ASSUMPTIONS FOR TARIFF COMPUTATIONS

	High Projected Tariff	Probable Projected Tariff	Low Projected Tariff
Projected Tariff to 4th Q, 1980 — $B	6.15	5.10/5.25	4.75
ICC Fair Value Rate Base:			
w/Inflation in P. L. Costs, 1975-80	8.0%/yr.	5.0%/yr.	5.0%/yr.
w/Average Life of Line	35.0 yrs.	35.0 yrs.	35.0 yrs.
Cum. Rate of Return on ICC Fair Value	7.0%	7.0%	7.0%
Deficiency/Loss Carry Forward	3 yrs.	3 yrs.	3 yrs.
Revenue Thruput to 12/31/80 — MBD	1,198,200	1,387,380	1,387,380
Construction Cost for 1,200 MBD Cap'y—$M	7,700	7,700	7,700
Interest During Construction — $M	1,300	1,300	1,300
Total Capital Cost for 1,200 MBD — $M	9,000	9,000	9,000
Disallowed Construction Costs — $M	—	—	100
Credits v. Sale of Wk. Equip. — $M	—	—	100
Net Capital Cost — $M	9,000	9,000	8,800
Average Debt to Total Capital — %	85.0%	85.0%	75.0%
Average Interest Rate on Debt — %	9.5%	9.5%	9.0%
Average Debt Retirement Period — Yrs.	20 yrs	20 yrs	15 yrs
Operating Costs — Manpower, Overhead, Fuel, etc. at 1,200 MBD — ¢/Bbl.	27.4¢/Bbl	27.4¢/Bbl	27.4¢/Bbl
Marginal Fuel Saving below 1,200 MBD	10.0¢/Bbl	10.0¢/Bbl	10.0¢/Bbl
Book Depreciation	35 yrs/SL	35 yrs/SL	35 yrs/SL
Amortization of Start-up and Disallowed Capital Costs or Acct'g. Treatment	Cur. Loss	Cur. Loss	10 yrs/SL
Tax Depreciation	18 yr/SYD	18 yr/SYD	18 yr/SYD
Investment Tax Credit	10.0%	10.0%	10.0%
State Ad Valorem Tax Rate v. Current Market Value of Pipeline	2.0%	2.0%	2.0%
State Corporate Income Tax Rate	9.4%	9.4%	9.4%
Federal Income Tax Rate	48.0%	48.0%	48.0%
Spill Fund Charge on First 2 Billion Bbls. Moved — ¢/Bbl.	5.0¢/Bbl	5.0¢/Bbl	5.0¢/Bbl
Removal Fund Charge V. 167 MM Annuity yielding 7% per year for 35 yrs.	40.0¢/Bbl	20.0¢/Bbl	20.0¢/Bbl

tential for variation of the different elements involved in the rate making process. Therefore, to the extent that actual thruput is greater or actual operating costs are less or profits are greater than presently estimated, these projected tariffs will remain in force a shorter period of time. The reverse is also true.

B. *U.S. Flag Tanker Availability*

The Merchant Marine Act of 1920, as amended, sometimes known as the Jones Act, reserved the marine trade between U.S. ports, known as domestic trade, to ships that are American built and documented and wholly-owned by American citizens (so-called "Jones Act" ships). The Merchant Marine Act of 1936 established a direct subsidy program for U.S. flag shipping, but ships receiving either a construction differential subsidy (CDS) or an operating differential subsidy (ODS) in order to make them competitive with foreign flag vessels are precluded from domestic trade. However, such U.S. flag ships in foreign trade may become eligible for the domestic trade for 6 months of each year by foregoing the ODS for the period involved and by repaying a prorated portion of the CDS.

The U.S. Maritime Administration (Marad), has prepared estimates of U.S. flag tanker requirements and availabilities for carrying Alaskan crude oil in a paper entitled "The U.S. Flag Tanker Fleet and Domestic Carriage Requirements", October 21, 1976.

Marad presented estimates for three future periods of the total deadweight capacity of U.S. flag tankers either eligible or that could be made eligible for trade between U.S. ports. Marad compiled estimates in a number of categories reflecting "the type of trade for which each vessel was felt to be suited in terms of physical or legal characteristics". It is emphasized that there is considerable flexibility in the deployment of shipping, however, and future market factors will substantially affect actual deployment. Estimates are shown in the following table.

TABLE VII-2

U.S.-Flag Tanker Fleet Supply *
(thousands of DWT)

Nominal Trade Category	1978.2	1980.1	1982.4
Domestic Trade Fleet:			
Other than Alaska	3,853.8	3,853.8	3,853.8
Alaska (incapable of Canal Transit)	1,838.1	2,818.1	2,968.1
Alaska (capable of Canal Transit-light)	1,057.2	1,146.9	1,146.9
Alaska (capable of Canal Transit-full)	—	—	—
Total	6,749.1	7,818.8	7,968.8
Foreign Trade Fleet (Non-CDS):			
Alaska-suited (incapable of Canal Transit)	521.7	521.7	521.7
Alaska-suited (capable of Canal Transit-light)	61.0	61.0	61.0
Alaska-suited (capable of Canal Transit-full)	1,227.4	1,227.4	1,227.4
Total	1,810.1	1,810.1	1,810.1
Foreign Trade Fleet (CDS)*:			
Alaska-suited (incapable of Canal Transit)	2,337.9	2,393.9	2,393.9
Alaska-suited (capable of Canal Transit-light)	982.2	982.2	982.2
Alaska-suited (capable of Canal Transit-full)	375.8	375.8	375.8
Total	3,695.9	3,751.9	3,751.9
Grand Total	12,255.1	13,380.8	13,530.8

* Three tankers (VLCC I, VLCC II, AND Zapata VLCC) have been excluded from consideration due to size. Each of these vessels will have a total dead-weight capacity of 390,000 DWT.

In addition, several tankers under charter to Military Sealift Command have been excluded because MSC presently expects these vessels to continue in their service.

Thus, the Marad analysis, which has generally been confirmed by Standard Oil of Ohio and the Exxon Corporation, the two major North Slope producers that would have to charter substantial number of tankers, reached the conclusions that, first, there will *not* be sufficient capacity in the Jones Act fleet alone to carry Alaskan crude oil in 1978 at rates of 700,000 barrels per day of North Slope oil to the West Coast; 500,000 barrels per day of North Slope crude to the U.S. Gulf Coast; and 150,000 barrels per day of oil from south Alaska to the West Coast, and, second, there *will* be sufficient capacity in the entire U.S. Flag Fleet, if available CDS and ODS tankers are converted to domestic trade. The tanker availability estimates of Marad and Sohio are summarized in the following table:

Table VII-3

U.S.-FLAG TANKER FLEET SUPPLY/DEMAND BALANCE, ALASKA OIL TRADE

(2nd Quarter, 1978; thousands of DWT)

US-Flag Supply	Marad	Sohio
Other than Alaska	3853.8	3736.3
Alaska-suited large tankers	6798.1	6277
Alaska-suited small tankers	1603.2	1472
	12255.1	11485.3
Less: Usage in other than Alaska Trade	3853.8	4250
	8401.3	7235.3
Less: Alaska Crude shipping Demand	4638.2	5020
Excess: Available for foreign trade	3763.1	2215.3

The significance of U.S. flag tanker availability to this study is that the supply of such tankers will have a direct bearing on tanker tariffs between Valdez and other U.S. ports. Without the conversion of subsidized vessels to domestic trade, it could be expected that the substantially increased demand for tankers caused by the Alaskan trade would cause tanker tariffs to increase substantially over current levels. With the increased supply of tankers resulting from conversion, however, tanker tariffs might not change significantly from existing levels. While it is yet too early to predict with precision the effect that increased Alaskan trade will have on domestic tanker tariffs, for purposes of this analysis it is assumed that tanker tariffs will not increase above existing levels. If they should increase, they would cause wellhead prices to be lower than the levels indicated in this analysis.

C. *Exchanges With Japan*

An alternative to selling ANS crude oil in the U.S. is to exchange it with a Japanese refiner in return for, say, Persian Gulf oil.

In general, an exchange may permit a reduction in total transport costs of the two parties to the exchange.

Or, by providing each party with a different crude than he would have without the exchange, it may provide the two parties together with a net increase in crude oil value. There will be a net change in crude oil value for the two parties together if the relative values of the two crude oils in the two different markets differ because of differences in processing costs, product slates, and product demands. Should an exchange permit a reduction in total transport costs, but at the same time involve a net reduction in crude oil values to the parties taken together, the exchange will still generate a net increase in total value if the savings in transport costs exceed the reduction in oil values.

The sections below discuss the component calculations involved in an exchange between an ANS crude oil owner and a Japanese refiner. In addition to components associated with transport costs and quality costs or benefits (crude oil values to the two refiners), calculations include a duty incurred on Persian Gulf crude landed in an exchange on the U.S. Gulf Coast.

As parties to an exchange, both the ANS crude owner and the Japanese refiner might be better off. Or, one party, say the ANS owner, might be made better off without the other party, the Japanese refiner, being made worse off. The extent to which each party gains by exchanging varies with the terms of the exchange. Regardless of the terms and the relative benefits to each party that result, the total net benefits are the same, given the transport costs, quality allowances, and applicable duties if any.

However, calculations in scenarios IV-VII in Chapter IX hypothesize that in an exchange total net savings to the two parties result in higher wellhead prices for the ANS crude. This allocates all the gain from the exchange to the ANS crude owner, none to the Japanese refiner. It should be noted, however, that it may be necessary, in

order to induce a foreign party into an exchange, that some of the net transportation savings be shared with it, thus reducing the benefits to the U.S. party. It should also be noted that not all of the U.S. cost savings from an exchange need accrue to the benefit of the ANS producers. It is possible, through adjustments in the entitlements program, to pass those savings on to refiner-purchasers and theoretically to consumers. In either event, wellhead prices would be lower than indicated in this analysis.

Finally, it should be emphasized that in an exchange involving domestic crude, the foreign crude received in exchange is ordinarily treated under the entitlements program exactly as the domestic crude would have been treated. Although transport costs, quality adjustments, and incurred duties may be different, there is assumed to be no difference in net entitlement benefit to domestic refiners who purchase the ANS crude if delivered to the U.S. Gulf Coast, or, alternatively, the Persian Gulf light when landed on the Gulf Coast in an exchange. The oil used in the U.S. is treated either as import tier or as upper tier for entitlement purposes, regardless of whether it is ANS crude or Persian Gulf light received under an exchange.

1. *Transportation Costs*

In the absence of an exchange, crude is shipped from Valdez to the U.S. Gulf Coast and Japan imports light crude from the Persian Gulf. For 1977, estimates of tanker costs are, respectively, $2.70 per barrel and $0.75 per barrel, the latter based on AFRA. This is a total of $3.45 incurred by both parties. The Valdez-U.S. Gulf tanker cost includes a $0.20 Panama Canal toll and a $0.20 lightering cost for passage through the Canal. In addition, for crude shipped from Valdez to the Gulf Coast there are two unloading losses of $0.07 per barrel for

each unloading and an unloading fee of $0.04 per barrel at the destination. On the delivery from the Persian Gulf to Japan there is a $0.07 per barrel unloading loss. Total transport costs to both parties, the sum of tanker rates, unloading losses, and unloading fees, are $3.45 + $0.18 + $0.07 = $3.70.

With exchange, the estimated tanker cost for shipping crude in U.S. flag tankers from Valdez to Japan is $1.25 per barrel. (All transport cost estimates are subject to error and this estimate especially because it depends upon U.S. flag tanker deployments in the West Coast, Gulf Coast, and Japan trade simultaneously). The AFRA-based rate from the Persian Gulf to the U.S. Gulf, including a $0.02 per barrel transshipment charge in the Caribbean, is $1.35 per barrel. The total for the two parties is $2.60. Adding $0.18 per barrel unloading losses and unloading fee on the shipment landed at the Gulf Coast and $0.07 per barrel on the shipment landed in Japan, brings total transport costs up to $2.85.

Thus, the net reduction in transport costs for both parties in an exchange is estimated at $3.70 – 2.85 = $0.85 per barrel. (See Table VII-4 on page 46).

2. *Quality Adjustments*

In an exchange, a Japanese refiner accepts a crude oil, ANS, that is worth $0.20 per barrel less to him, in these calculations, than Persian Gulf light. At the same time the ANS crude owner lands Persian Gulf light on the U.S. Gulf that is $0.10 more valuable to him there than the ANS crude.

Thus, there is a net reduction in crude oil values to the two parties, taken together, of $0.10 per barrel.

3. *U.S. Duty*

In the current analysis, the foreign barrel entering the U.S. is assumed to incur the full $0.21 import fee. This becomes a factor that reduces the total gain from exchange.

4. *Gain From an Exchange*

In an exchange, total transport costs would be reduced by $0.85 per barrel. This gain is partially offset by a net reduction in crude value to the two refiners of $0.10 per barrel and a U.S. import charge of $0.21 per barrel.

The net total gain to the two parties is $0.85 — $0.10 — $0.21 = $0.54 per barrel. If a foreign tanker rate estimate of $0.45 per barrel is applicable for a Valdez to Japan delivery, the total gain in an exchange is increased by $0.80 to $1.34 per barrel.

5. *The Effective Exchange Rate: Allocating Gain Entirely to the ANS Owner*

The division of the net total gain varies with the effective terms of the actual exchanges the two parties settle upon.

In scenarios IV-VII, all the gain is enjoyed by the ANS owner, although a Japanese refiner is left no worse off. It is as if the ANS owner offers an exchange in which he takes delivery at the Persian Gulf, and offers each Japanese refiner a delivery in Japan of ANS crude. It would pay each Japanese refiner to offer a crude oil exchange rate up to the rate that would be equivalent to a landed cost per barrel to him not greater than what he can land Persian Gulf light for with his appropriate quality adjustment. If there is sufficient competition among Japanese refiners to yield this result, all gains accrue to the ANS owner.

In scenarios IV and V, the effect for the exchanged part of ANS crude is a $0.54 higher Valdez or wellhead net back price for the ANS crude in 1977 than realized by marketing on the Gulf Coast under the same entitlements treatments. In scenarios VI and VII, in which foreign flag tankers are used to Japan, the effect is a $1.34 higher wellhead price.

The computation under scenarios IV and V is as follows:

Without exchange

Costs of transportation to the Gulf Coast is $2.70 + $0.18 = $2.88.

With exchange

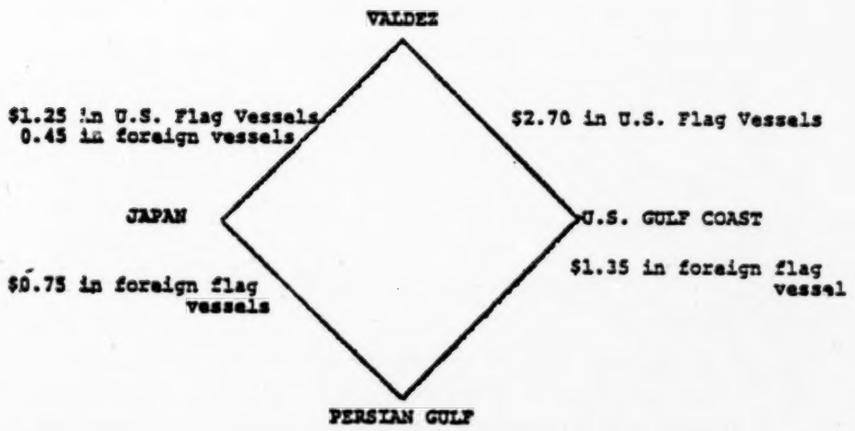
Transportation cost from the Persian Gulf to the U.S. Gulf Coast is $1.35 + $0.18 = $1.53 per barrel. Add $1.25 + $0.07 = $1.32 in cost from Valdez to Japan. In Japan, get an effective crude oil exchange rate from a Japanese refiner that leaves him no worse off. He settles on a rate such that the ANS owner's total effective costs are (1) reduced by $0.75 + $0.07 = $0.82 per barrel because of transport costs avoided by the Japanese refiner; and (2) increased by $0.20 per barrel because of a quality reduction *incurred* by the Japanese refiner. Finally the ANS owner pays $0.21 per barrel import charge at the U.S. Gulf. The algebraic sum or net cost to the ANS owner is:

$$\$1.53 + \$0.21 + \$1.32 - \$0.82 + \$0.20 = \$2.44.$$

The net gain to the ANS owner is $2.88 — $2.44 + $0.10 = $0.54 which is measured as an increase in his realized netback. Under scenarios VI and VII, the same calculation is made except that $0.45 is used as the Valdez to Japan transportation charge, in which case the net gain at the wellhead is $1.34.

TABLE VII-4

Potential Ocean Tanker Cost Savings of an Exchange with Japan (1978)



Combined tanker costs of delivering a barrel of crude to the U.S. Gulf coast and a barrel of crude to Japan.

1. Direct Shipment		$3.45
Valdez to U.S. Gulf	$2.70	
Persian Gulf to Japan	.75	
2. Exchange with Japan		
A. Using U.S. Flag vessels from Valdez to Japan		$2.60
Valdez to Japan	$1.25	
Persian Gulf to U.S. Gulf	1.35	
B. Using foreign flag vessels from Valdez to Japan		$1.80
Valdez to Japan	$0.45	
Persian Gulf to U.S. Gulf	1.35	

Tanker cost savings from the exchange

1. Using U.S. Flag vessels from Valdez to Japan		$0.85
Direct Shipment	$3.45	
Less exchange	- 2.60	
2. Using foreign flag vessels from Valdez to Japan		$1.65
Direct Shipment	$2.45	
Less Exchange	- 1.80	

CHAPTER VIII

ENTITLEMENT TREATMENT

Under FEA price reguations adopted to implement the statutory crude oil composite price regulations, domestic crude oil is classified as lower tier (about 50 percent of total production), upper tier (about 36 percent) and stripper well (about 14 percent).

Stripper well crude oil, which is production from properties which have declined to a level of 10 barrels per day per well or less for a 12 month period, is permitted by statute to be sold at market price levels in order to provide incentives to prolong production of marginal properties.

Upper tier crude oil generally includes production from properties which began production after 1972, plus incremental production from older properties which exceeds a certain base production level. The upper tier price (which averaged $11.64 per barrel at the wellhead at the end of 1976, or roughly $2.00 below the delivered cost of imports) is generally designed to stimulate additional production from older properties and to encourage further exploration and development of new domestic crude oil resources.

The lower tier price, which averaged about $5.17 at the wellhead nationally at the end of 1976, applies to all production which is not exempt, or which does not qualify as upper tier crude oil.*

Given the range of domestic crude oil prices, some crude oil cost equalization mechanism was determined by FEA to be essential. Otherwise, wide price disparities for controlled products would exist for end users, and

* In December 1976, the most recent month for which actual (preliminary) price data is currently available, the actual composite price at the wellhead for upper and lower tier domestic crude oil was $8.40.

refiners having disproportionately greater access to lower price oil would either reap substantial windfall profits or be in a position to drive their higher cost competitors out of business. In practice each refiner generally has a different "mix" of lower tier, upper tier, and exempt or imported crude oil, due to historical pricing patterns and the location of individual refiners.

The FEA domestic crude oil allocation (entitlements) program is the program FEA implemented in December 1974 to help equalize crude oil costs among U.S. refiners. Essentially, the entitlements program (subject to certain qualifications not here relevant), by requiring transfers of cash through purchases and sales of entitlements among refiners, achieves the same result as if FEA had directly allocated to each refiner a "mix" of lower tier, upper tier, exempt, and imported crude oil which reflected the national supply ratios for each of these price categories of crude oil.

Stated another way, the entitlements program means that lower tier crude oil, upper tier crude oil, and exempt and imported crude oil all have relatively equivalent effective acquisition costs to the refiner (subject to certain qualifications and assuming insubstantial variations in quality). Also, because the entitlement transfers are computed nationally on the basis of total volumes of lower tier, upper tier, and uncontrolled oil, and on the basis of the national average prices of these broad classifications, the net payment by or to a given refiner depends not on the price or quality of an individual crude, but rather on these national averages.

The mechanism for equalizing costs operates essentially as follows: Each refiner is required to report his costs and volumes of crude oil purchased each month, broken down by lower and upper tier domestic oil and imports.*

* For purposes of the entitlements program, uncontrolled domestic stripper well oil is treated in the same category as imported oil.

National average prices and supply ratios for each category are then established, and each refiner is assigned "entitlements" to refine a mix of crude oil that reflects the national ratio. An entitlements value is also assigned to each tier that reflects the average cost differentials among the various tiers for that month. Refiners that purchased and ran a disproportionate supply of relatively cheap lower tier oil will have an entitlements deficit that they must make up by purchasing excess entitlements from those refiners that purchased and ran a disproportionate amount of upper tier or imported oil. For each month, the value of entitlements that must be purchased will exactly equal the amount available for sale on a nationwide basis.

It is important to note that, because the purpose of the entitlements program is to equalize refiners' costs rather than producers' revenues, entitlements values are based on average laid in costs to refiners, inclusive of transportation costs. This distinction from FEA's crude oil ceiling price rules, which apply to wellhead prices exclusive of transportation, has considerable significance for the pricing of ANS production, as will be seen below.

As a consequence of the method of entitlement computation, and because regulated domestic crude oil prices are ceilings, rather than mandated levels, the incentive exists for refiners to shop competitively for crudes in order to minimize their total feedstock acquisition costs, comprised of delivered crude costs plus or minus the entitlements costs or benefits. Thus, a practical effect of the entitlement cost equalization program is that the program created to equalize costs becomes also a vehicle for influencing the delivered prices that producers will receive for their crude at the refinery gate. For example, refiners contemplating the purchase of a new supply of crude will determine the price that they are willing to pay for that crude based on their average acquisition

costs of existing crudes, the comparative quality of the new crude, the difficulty of processing and the value of the petroleum products which can be produced from it, and the entitlement benefits the refiner can expect to receive for it. In the case of ANS crude, therefore, the delivered price a given refiner will be willing to pay ANS crude producers for their oil will depend very heavily on whether FEA decides to treat ANS crude for entitlement purposes as upper tier or as import/uncontrolled tier oil.

To take a specific example, suppose that a refiner regards ANS crude to have the same processing difficulty and to yield the same value of products as a certain alternate imported crude. If the ANS crude were treated as import tier crude for entitlement purposes, then the refiner would get the same entitlement value for an incremental barrel of ANS crude as for imports, and would therefore be willing to pay a delivered price for ANS crude roughly equivalent to the landed cost of the import. If, however, ANS crude were treated as upper tier oil for entitlements purposes and the refiner therefore received the much smaller entitlement value, he would only be willing to pay a delivered price for ANS crude that would be lower than the price of the import by the amount of the difference in entitlement values for import and upper tier oils.

The monies transferred among refiners are considered to be costs of obtaining crude, which, under FEA regulations can be passed through into the prices of finished products. The regulations require refiners that sell entitlements (i.e., receive money) to reduce their increased costs by an amount equal to the revenue received. The refiner that incurs an additional cost in obtaining entitlements may include this in the increased costs of product. These cost-pass-through regulations, acting in concert with market forces, cause each refiner to adjust product

prices so as to transfer the value of the entitlements transaction to the end user. All refiners are put on a competitive cost basis for their products and marketers and consumers are able to obtain their supplies at much more competitive prices than would exist without the entitlements program.

Table VIII gives an example of how the refiners' costs are adjusted. The crude oil data used are the volumes and prices projected by FEA for May, 1977.

TABLE VIII

ENTITLEMENT PROGRAM EFFECTS

CRUDE OIL TIER

	Imported *	Exempt Domestic	Upper Tier	Lower Tier
Refiner Cost	$ 14.45	$ 14.45	$ 11.38	$ 5.57
Run Credit	—3.07	—3.07	—3.07	—3.07
Entitlement Purchase	—	—	+2.86	+8.67
Net Cost	$ 11.38	$ 11.38	$ 11.17	$ 11.17
Volume (MMB/D)	5.80	1.11	2.92	3.88

* Includes $0.21 supplemental import fee.

CHAPTER IX

CONCLUSIONS REGARDING INCENTIVES FOR NON-ANS CRUDE PRODUCTION

As noted above, if ANS crude is subject to the ceiling price rules for upper tier oil, which is the category into which it would be placed under existing regulations, those rules would have no restraining effect on ANS wellhead prices for several years. Instead, the principal FEA program which will establish the wellhead price of ANS crude is, as noted in the previous chapter, the entitlements program. FEA is now considering at least three possible entitlement classifications for ANS. FEA is also considering whether to recommend that the ANS crude be included or excluded from the composite. Lastly, the

Administration has at least not ruled out the possibility of exchanging ANS crude with Japan for Persian Gulf crude delivered to the U.S. Gulf and East Coasts, as many persons and organizations have proposed. Since no decisions on these issues have been reached, the analysis herein explores the effects under all reasonably possible alternatives.

Estimates of the wellhead prices that should result from adoption of alternative entitlement classifications as well as exchanges with Japan have been developed. The product of the amount by which these prices are above or below the legal composite at the time, times the total volume of ANS crude sold at those prices, is also provided, since it is this amount by which the revenues of non-ANS producers could be increased or would have to be reduced in order to comply with the composite limitation, assuming ANS crude is kept in the composite calculation. No analysis is contained herein of the issue of whether ANS crude should remain in the composite calculation or, if it did remain in the composite and was below the legal composite price, whether the additional pricing flexibility that would be created should be used to raise ceiling prices for any categories of non-ANS production.

The scenarios used in this analysis were chosen to cover a wide range of policy options. Each is evaluated under three different rates of increase in the cost of imported crudes. The three rates, 5.5%, 7.5%, and 10%, were chosen to reflect the range of likely increases.

The evaluation of these scenarios is not intended to preclude other policy options, or to reflect any policy preference. A methodology for evaluating certain policy aspects has been developed, and *the results of several evaluations are presented to assist in the development of the final policy.*

Scenario I

ANS crude will be competitively priced at the refinery gate with imported and uncontrolled domestic crude on both the Gulf Coast and the West Coast. The ANS price will therefore rise as import prices increase.

Scenario II

ANS crude will be competitively priced at the refinery gate with upper tier domestic crude on both the Gulf and the West Coast. The ANS price will therefore increase at the same rate as upper tier prices. The schedule of upper tier prices has been developed without including ANS crude in the composite.

Scenario III

ANS crude will be competitively priced at the refinery gate with imported and uncontrolled domestic crude on the Gulf Coast and with upper tier domestic crude on the West Coast. ANS prices will therefore be a blend of those in Scenarios I and II.

Scenario IV

All West Coast surplus ANS crude will be exchanged with Japan for Persian Gulf light crude, and will be priced as if it were an imported crude when landed on the West and Gulf Coasts. U.S. tankers will be used to ship ANS crude to Japan. Increases in the ANS prices will follow those of uncontrolled crudes.

Scenario V

All West Coast surplus ANS crude will be exchanged with Japan for Persian Gulf light crude using U.S. tankers. The ANS will be classed as upper tier crude. Therefore, the incoming Persian Gulf crude will be classed as upper tier oil. The ANS crude used on the West Coast will also be classed as upper tier oil.

Scenario VI

All West Coast surplus ANS crude will be exchanged with Japan for Persian Gulf light crude. Shipments to Japan will be made in foreign flag carriers. The ANS crude used on the West Coast and the crude received on the Gulf Coast in the exchange will be classed as upper tier for entitlement purposes. As in Scenario V, the ANS crude prices will increase with the prices of upper tier oil.

Scenario VII

All West Coast surplus ANS crude will be exchanged with Japan for Persian Gulf light crude, and will be priced as if it were imported crude when landed on the West and Gulf Coasts. Foreign flag tankers will be used for all crude shipments.

The prices that refiners are expected to pay for the ANS crude under each scenario are established by the entitlement classification assigned by FEA. Classification as uncontrolled crude will cause the ANS price to be at par with that of imported, stripper, and Naval Petroleum Reserve crudes) [sic]. The assignment of ANS crude to the upper tier will cause its market value to be at par with upper tier crudes. In exchanges with Japan, the entitlement classification assigned to the incoming crude will set the U.S. market price for that crude. The exchange is expected to be on a barrel for barrel basis with an adjustment for quality and transportation. Therefore, as in any domestic exchange, the firm giving up crude assigns the value of the crude it gives up to the crude it receives, and includes any quality/transportation adjustment involved in the exchange.

Assumptions Underlying the Analysis

1. Shipments from Valdez begin in September 1977, and reach 1,200,000 B/D in December 1978. Shipments remain at this rate through 1981. (Table IX-1)

2. The average cost of imported crude is now $14.45. It is assumed to escalate twice yearly at annual rates of 5.5%, 7.5%, and 10%.
3. ANS crude, classed as uncontrolled crude, is valued at 25 cents below Persian Gulf light on the West Coast and 10 cents below Persian Gulf light on the Gulf Coast. Stated another way, ANS crude is valued below the average cost of all imported crudes in the United States (Tables IX-2 A, B, C). This value difference is 75 cents on the West Coast and 45 cents on the Gulf Coast.
4. The value of ANS crude, if classed by FEA as upper tier, is its value as an uncontrolled crude less the difference in entitlement value of uncontrolled and upper tier crudes. This difference is equal to the average uncontrolled price minus the average upper tier price. This analysis uses the upper tier prices projected under the FEA procedures for implementing the 10% escalation of the composite price.
5. Ocean transport tariffs escalate at a rate sufficient to cover the increases in variable shipping costs.
6. The volume of ANS crude used on the West Coast reaches 800 MB/D in July 1978, and remains at that level. The remaining crude is used on the Gulf Coast, directly or through an exchange.
7. A West Coast-Gulf Coast pipeline becomes operational in July 1979. Then, all crude shipments to the Gulf Coast are made via the pipeline, rather than by tanker through the Panama Canal. 400,000 B/D are shipped by this pipeline to Houston, Texas.
8. TAP tariffs of $5.10 through the first half of 1980 and $4.65 after that, are used in this analysis.
9. Exchanges with Japan are evaluated using foreign flag and U.S. flag tankers to ship ANS crude to Japan.

All the transportation savings created by these exchanges are, for this analysis, assumed to result in higher wellhead prices for the ANS crude.

TABLE IX-1

VOLUMES OF ANS CRUDE
(MB/D)

Month	Line Fill	Puget Sound	San Francisco	Los Angeles	Gulf Coast	Total
7/77	240	—	—	—	—	240
8/77	240	—	—	—	—	240
9/77	50	60	90	150	—	350
10/77	—	100	200	300	—	600
11/77	—	100	200	300	—	600
12/77	—	120	250	340	490	1200
1/78	—	120	250	340	490	1200
7/78	—	120	280	400	400	1200
↓		↓	↓	↓	↓	↓
12/81	—	120	280	400	400	1200

Methodology

1. *Market Value of ANS Crude*

The projected ANS market price on each Coast, if it is priced competitively with uncontrolled oil, is arrived at by subtracting the quality differential from the cost of uncontrolled crudes. The delivered price of ANS crude, if it is to be priced as upper tier oil, is established by subtracting the net entitlement difference between uncontrolled and upper tier oil from the ANS value as uncontrolled crude. This maintains the same relative quality/price relationship for the ANS crude when it is treated as upper tier oil as when it is classed with the uncontrolled oil. The refiners' cost, whether ANS is treated as upper tier oil or uncontrolled will be the same, since the difference in entitlements treatment offsets the difference in purchase costs.

The market values of ANS crudes on both coasts under the free world crude price inflation rates are shown in Table IX-2.

TABLE IX-2A

ANS VALUES IF IMPORTS INCREASE AT 5.5%

	Average Imports	ANS VALUE: As Imports West	As Imports Gulf	As Upper Tier * West	As Upper Tier * Gulf
2/77	14.84	14.09	14.39	12.16	12.46
1/78	15.28	14.53	14.83	12.41	12.71
2/78	15.68	14.93	15.23	12.75	13.05
1/79	16.11	15.36	15.66	13.11	13.41
2/79	16.55	15.80	16.10	13.47	13.77
1/80	17.00	16.25	16.55	13.85	14.15
2/80	17.47	16.72	17.02	14.22	14.52
1/81	17.95	17.20	17.50	14.62	14.92
2/81	18.44	17.69	17.99	15.02	15.32

TABLE IX-2B

ANS VALUES IF IMPORTS INCREASE AT 7.5%

Half Year	Average Import Cost	ANS VALUE: As Imports West	As Imports Gulf	As Upper Tier * West	As Upper Tier * Gulf
2/77	14.99	14.24	14.54	12.16	12.46
1/78	15.55	14.80	15.10	12.41	12.71
2/78	16.14	15.39	15.69	12.75	13.05
1/79	16.74	15.99	16.29	13.11	13.41
2/79	17.37	16.62	16.92	13.47	13.77
1/80	18.02	17.27	17.57	13.85	14.15
2/80	18.70	17.95	18.25	14.22	14.52
1/81	19.40	18.65	18.95	14.62	14.92
2/81	20.13	19.38	19.68	15.02	15.32

* See footnote on bottom of next page.

TABLE IX-2C

ANS VALUES IF IMPORTS INCREASE AT 10%

Half Year	Average Import Cost	ANS VALUE As Imports West Coast	As Imports Gulf Coast	As Upper Tier * West Coast	As Upper Tier * Gulf Coast
2/77	15.17	14.42	14.72	12.16	12.46
1/78	15.93	15.18	15.48	12.41	12.71
2/78	16.73	15.98	16.28	12.75	13.05
1/79	17.56	16.81	17.11	13.11	13.41
2/79	18.44	17.69	17.99	13.47	13.77
1/80	19.36	18.61	18.91	13.85	14.15
2/80	20.33	19.58	19.88	14.22	14.52
1/81	21.35	20.60	20.90	14.62	14.92
2/81	22.42	21.67	21.97	15.02	15.32

2. *Wellhead Price of ANS Crude*

The wellhead prices are calculated by subtracting the transportation charges from Alaska's North Slope from the market prices. Since the ANS crude is assumed to sell at its full market price in all the Gulf and West Coast markets, there will be at least two wellhead prices for the same crude. For this analysis, a weighted average wellhead price is developed for each scenario.

For example, using Scenario I, in the first half of 1978, the wellhead price is calculated as follows if ANS crude prices are uncontrolled:

* Upper tier values are independent of the inflation rate of imports. A constant 5.5% annual increase is projected for upper tier crudes.

TABLE IX-3

WELLHEAD PRICE CALCULATIONS

Market Point	Market Price	less	Ocean Transport	less	TAP Tariffs	=	Wellhead Netback	Volume (M/bbls)
Puget Sound	$14.53		$0.74		$5.10		$8.69	120
San Francisco	14.53		0.96		5.10		8.47	250
Los Angeles	14.53		1.01		5.10		8.42	340
Gulf Coast	14.83		2.98		5.10		6.75	490

Average Wellehead Price=

$$\frac{(\$8.69 \times 120) + (\$8.47 \times 250) + (\$8.42 \times 340) + (\$6.75 \times 490)}{120 + 250 + 340 + 490}$$

$$= \$7.77$$

3. *Impact of including ANS in the actual composite price.*

The inclusion of ANS crude wellhead prices in the calculation of the composite price of all U.S. crudes will cause the composite to change from its value without ANS crude. If ANS crude wellhead prices are below the actual composite, they will lower the actual composite relative to the legal composite, and the opposite is true if ANS wellhead prices are above the actual composite.

For purposes of analysis herein, a "revenue differential," which is the amount average ANS wellhead prices will exceed or be less than the legal composite, times the total volume of ANS crude sold, has been computed for each pricing scenario. This "revenue differential" represents the amount by which, if ANS wellhead prices are included in the composite calculation, additional revenues from non-ANS production could be obtained (by raising the ceiling prices on such production) without exceeding the composite price ceiling. If the revenue differential is negative, it represents the amount by which revenues

from non-ANS production would have to be reduced in order to maintain compliance with the composite price ceiling.

The calculation of the revenue differential is for analytical purposes only. It should not be viewed as an indication of future pricing policy with regard to inclusion of ANS wellhead prices in the calculation of the composite or as an indication that, if they are included, the flexibility obtained by a positive revenue differential will be used to raise ceiling prices on non-ANS production.

The average wellhead price for each half year, the amount by which that price differs from the average legal composite wellhead price and the *monthly* revenue differentials for each scenario are shown in Tables IX-4, IX-5 and IX-6. Negative differentials are shown by enclosing them in parentheses. A summary of the price differentials projected for each scenario is shown in Table IX-7.

TABLE IX-4

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

DIRECT U.S. USAGE

Import Crude Prices Escalate at 5.5% Annually

Period	Legal Composite $/bbl	SCENARIO I Wellhead Price $/bbl	SCENARIO I Diff. From Legal Composite	SCENARIO I Revenue Differential $MM/Month	SCENARIO II Wellhead Price $/bbl	SCENARIO II Diff. From Legal Composite	SCENARIO II Revenue Differential $MM/Month	SCENARIO III Wellhead Price $/bbl	SCENARIO III Diff. From Legal Composite	SCENARIO III Revenue Differential $MM/Month
III/IV-77	8.85	7.40	1.45	53	5.47	3.38	123	6.26	2.59	95
I/II-78	9.28	7.80	1.48	54	5.66	3.62	132	6.52	2.66	101
III/IV-78	9.73	8.30	1.43	52	6.12	3.61	132	6.85	2.88	105
I/II-79	10.31	8.67	1.56	56	6.42	3.79	138	7.17	3.04	111
III/IV-79	10.71	9.38	1.33	48	7.05	3.66	134	7.83	2.88	105
I/II-80	11.23	9.78	1.45	53	7.38	3.83	141	8.18	3.05	111
III/IV-80	11.78	10.70	1.08	39	8.20	3.58	131	9.03	2.75	100
I/II-81	12.35	11.13	1.22	45	8.55	3.80	139	9.41	2.94	107
III-81	12.86	11.42	1.34	49	8.85	4.01	146	9.84	3.02	114
Entitlement Classification										
Gulf Coast		Decontrolled			Upper Tier			Uncontrolled Upper Tier		
West Coast		Decontrolled			Upper Tier					
Carrier to Japan		----			-----			-----		

TABLE IX-4B

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

DIRECT U.S. USAGE

Import Crude Prices Escalate at 7.5% Annually

		SCENARIO I			SCENARIO II			SCENARIO III		
Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month
III/IV-77	8.85	7.55	1.30	47	5.47	3.38	123	6.33	2.53	92
I/II-78	8.88	8.05	1.23	45	5.66	3.62	132	6.63	2.65	97
III/IV-78	9.73	8.76	0.93	35	6.12	3.61	132	7.00	2.73	100
I/II-79	10.21	9.30	0.91	34	6.42	3.79	138	7.38	2.83	103
III/IV-79	10.71	10.20	0.51	19	7.05	3.66	134	8.10	2.51	95
I/II-80	11.23	10.80	0.43	16	7.38	3.83	141	8.52	2.71	99
III/IV-80	11.78	11.93	(0.15)	(5)	8.20	3.58	131	9.44	2.34	85
I/II-81	12.35	12.58	(0.23)	(8)	8.55	3.80	139	9.89	2.46	90
III-81	12.96	13.31	(0.35)	(13)	8.95	4.01	146	10.40	2.56	93

Entitlement Classification

Gulf Coast	Uncontrolled		Upper Tier		Uncontrolled
West Coast	Uncontrolled		Upper Tier		Upper Tier
Carrier to Japan	----		----		----

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TABLE IX-4C

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

DIRECT U.S. USAGE

Import Crude Prices Escalate at 10% Annually

		SCENARIO I			SCENARIO II			SCENARIO III		
Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month
III/IV-77	8.85	7.73	1.12		5.47	3.38	123	6.40	2.45	89
I/II-78	9.28	8.43	0.85	31	5.66	3.62	132	6.79	2.49	91
III/IV-78	9.73	9.35	0.38	14	6.12	3.61	132	7.20	2.53	92
I/II-79	10.21	10.12	0.09	4	6.42	3.79	138	7.65	2.56	93
III/IV-79	10.71	11.27	(0.56)	(20)	7.05	3.66	134	8.46	2.25	82
I/II-80	11.23	12.14	(0.91)	(33)	7.38	3.83	141	8.97	2.26	82
III/IV-80	11.78	13.56	(1.78)	(65)	8.20	3.58	131	9.99	1.79	65
I/II-81	12.35	14.53	(2.18)	(80)	8.55	3.80	139	10.54	1.81	66
III-81	12.96	15.60	(2.64)	(96)	8.95	4.01	146	11.17	1.79	65

Entitlement Classification

Gulf Coast	Uncontrolled		Upper Tier		Uncontrolled
West Coast	Uncontrolled		Upper Tier		Upper Tier
Carrier to Japan	----		----		----

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TABLE IX-5A

AND WELLHEAD PRICES, DIFFERENTIALS FRO LEGAL COMPOSITE
PRICES AND REVENUE DIFFERENTIALS

EXCHANGES WITH JAPAN

Import Crude Prices Escalate at 5.5% Annually

Period	Legal Composite $/BBL	SCENARIO IV Wellhead Price $/BBL	SCENARIO IV Diff. From Legal Composite	SCENARIO IV Revenue Differential $MM/Month	SCENARIO V Wellhead Price $/BBL	SCENARIO V Diff. From Legal Composite	SCENARIO V Revenue Differential $MM/Month	SCENARIO VI Wellhead Price $/BBL	SCENARIO VI Diff. From Legal Composite	SCENARIO VI Revenue Differential $MM/Month
III/IV-77	8.85	7.65	1.20	44	5.72	3.13	114	6.05	2.80	102
I/II-78	9.28	8.05	1.23	45	5.93	3.35	122	6.26	3.02	110
III/IV-78	9.73	8.52	1.21	44	6.34	3.39	124	6.61	3.12	114
I/II-79	10.21	8.91	1.30	47	6.66	3.55	130	6.93	3.28	120
III/IV-79	10.71	9.35	1.36	50	7.02	3.69	135	7.29	3.42	125
I/II-80	11.23	9.72	1.51	55	7.32	3.91	143	7.63	3.60	132
III/IV-80	11.78	10.64	1.14	42	8.14	3.64	133	8.45	3.33	122
I/II-81	12.35	11.07	1.28	47	8.49	3.86	141	8.80	3.55	130
III-81	12.96	11.56	1,40	51	8.89	4.07	149	9.20	3.76	137
Entitlement Classification										
Gulf Coast			Uncontrolled			Upper Tier			Upper Tier	
West Coast			Uncontrolled			Upper Tier			Upper Tier	
Carrier to Japan			U.S. Flag			U.S. Flag			Foreign Flag	

TABLE IX-5B

AND WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE
PIECES AND REVENUE DIFFERENTIALS

EXCHANGES WITH JAPAN

Import Crude Prices Escalate at 7.5% Annually

Period	Legal Composite $/BBL	SCENARIO IV Wellhead Price $/BBL	SCENARIO IV Diff. From Legal Composite	SCENARIO IV Revenue Differential $MM/Month	SCENARIO V Wellhead Price $/BBL	SCENARIO V Diff. From Legal Composite	SCENARIO V Revenue Differential $MM/Month	SCENARIO VI Wellhead Price $/BBL	SCENARIO VI Diff. From Legal Composite	SCENARIO VI Revenue Differential $MM/Month
III/IV-77	8.85	7.80	1.05	38	5.72	3.13	114	6.05	2.80	102
I/II-78	9.28	8.32	0.96	34	5.93	3.35	122	6.26	3.02	110
III/IV-78	9.73	8.98	0.75	27	6.34	3.39	124	6.61	3.12	114
I/II-79	10.21	9.54	0.67	24	6.66	3.55	130	6.93	3.28	120
III/IV-79	10.71	10.17	0.54	20	7.02	3.69	135	7.29	3.42	125
I/II-80	11.23	10.74	0.49	18	7.32	3.91	143	7.63	3.60	132
III/IV-80	11.78	11.87	(0.94)	(3)	8.14	3.64	133	8.45	3.33	122
I/II-81	12.35	12.52	(0.17)	(6)	8.49	3.86	141	8.80	3.55	130
III-81	12.96	13.25	(0.29)	(11)	8.89	4.07	149	9.20	3.76	137
Entitlement Classification										
Gulf Coast			Uncontrolled			Upper Tier			Upper Tier	
West Coast			Uncontrolled			Upper Tier			Upper Tier	
Carrier to Japan			U.S. Flag			U S. Flag			Foreign Flag	

TABLE IX-5C

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

EXCHANGES WITH JAPAN

Import Crude Prices Escalate at 10% Annually

		SCENARIO IV			SCENARIO V			SCENARIO VI		
Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month
III/IV-77	8.85	7.98	0.87	32	5.72	3.13	114	6.05	2.80	102
I/II-78	9.28	8.70	0.58	21	5.93	3.35	122	6.26	3.02	110
III/IV-78	9.73	9.57	0.16	6	6.34	3.39	124	6.61	3.12	114
I/II-79	10.21	10.36	(0.15)	(5)	6.66	3.55	130	6.93	3.28	120
III/IV-79	10.71	11.24	(0.47)	(19)	7.02	3.69	135	7.29	3.42	125
I/II-80	11.23	12.08	(0.85)	(31)	7.32	3.91	143	7.63	3.60	132
III/IV-80	11.78	13.50	(1.72)	(63)	8.14	3.64	133	8.45	3.33	122
I/II-81	12.35	14.47	(2.12)	(77)	8.49	3.86	141	8.80	3.55	130
III-81	12.96	15.54	(2.58)	(94)	8.89	4.07	149	9.20	3.76	137
Entitlement Classification										
Gulf Coast		Uncontrolled			Upper Tier			Upper Tier		
West Coast		Uncontrolled			Upper Tier			Uncontrolled		
Carrier to Japan		U.S. Flag			U.S. Flag			Foreign Flag		

TABLE IX-6A

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

EXCHANGES WITH JAPAN

Import Crude Prices Escalate at 5.5% Annually

SCENARIO VII

Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month
III/IV-77	8.85	7.98	0.87	32
I/II-78	9.28	8.38	0.90	33
III/IV-78	9.73	8.79	0.94	34
I/II-79	10.21	9.18	1.03	38
III/IV-79	10.71	9.62	1.09	40
I/II-80	11.23	10.03	1.20	44
III/IV-80	11.78	10.95	0.83	30
I/II-81	12.35	11.38	0.97	35
III-81	12.96	11.87	1.09	40
Entitlement Classification				
Gulf Coast		Uncontrolled		
West Coast		Uncontrolled		
Carrier to Japan		Foreign Flag		

TABLE IX-6B

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

EXCHANGE WITH JAPAN

Import Crude Prices Escalate at 7.5% Annually

SCENARIO VII

Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff From Legal Composite	Revenue Differential $MM/Month
III/IV-79	8.85	8.13	0.72	26
I/II-78	9.28	8.65	0.63	23
III/IV-78	9.73	9.25	0.48	18
I/II-79	10.21	9.81	0.40	15
III/IV-79	10.71	10.44	0.27	10
I/II-80	11.23	11.05	0.18	7
III/IV-80	11.78	12.18	(0.40)	(15)
I/II-81	12.35	12.83	(0.48)	(18)
III-81	12.96	13.56	(0.60)	(22)

Entitlement Classification

Gulf Coast — Uncontrolled
West Coast — Uncontrolled

Carrier to Japan — Foreign Flag

TABLE IX-6C

ANS WELLHEAD PRICES, DIFFERENTIALS FROM LEGAL COMPOSITE PRICES AND REVENUE DIFFERENTIALS

EXCHANGE WITH JAPAN

Import Crude Prices Escalate at 10% Annually

SCENARIO VII

Period	Legal Composite $/BBL	Wellhead Price $/BBL	Diff. From Legal Composite	Revenue Differential $MM/Month
III/IV-77	8.85	8.31	0.54	20
I/II-78	9.28	9.03	0.25	9
III/IV-78	9.73	9.84	(0.11)	(4)
I/II-79	10.21	10.63	(0.42)	(15)
III/IV-79	10.71	11.51	(0.80)	(29)
I/II-80	11.23	12.39	(1.16)	(42)
III/IV-80	11.78	13.81	(2.03)	(74)
I/II-81	12.55	14.78	(2.43)	(89)
III-81	12.96	15.85	(2.89)	(105)

Entitlement Classification

Gulf Coast — Uncontrolled
West Coast — Uncontrolled

Carrier to Japan — Foreign Flag

TABLE IX-7

SUMMARY OF DIFFERENTIAL FROM LEGAL COMPOSITE PRICES CREATED BY INCLUDING ANS IN THE COMPOSITE
($ per barrel)

Refiner Entitlement Classification		Ocean Carrier	Annual Rate of Increase in the Cost of Imported Crude		
			5.5%	7.5%	10%
Gulf Coast	West Coast				
Refine only in the U.S.					
Uncontrolled	Uncontrolled	Jones Act	$1.40	$1.25 ⟶ (0.40)	$0.95 ⟶ (2.50)
Upper Tier	Upper Tier	Jones Act	3.60	3 60	3.60
Uncontrolled	Upper Tier	Jones Act	3.00	2.60	2.30
Exchange with Japan					
Uncontrolled	Uncontrolled	U.S. Flag	$1.40	$0.95 ⟶ (0.25)	$0.80 ⟶ (2.50)
Upper Tier	Upper Tier	U.S. Flag	3.30-4.00	3.30-4.00	3.30-4.00
Upper Tier	Upper Tier	Foreign Flag	3.00-3,60	3.00-3.60	3.00-3.60
Uncontrolled	Uncontrolled	Foreign Flag	0.95	0.70 ⟶ (0.55)	0.55 ⟶ (2.75)

NOTE: (1) The revenue differential can be obtained by multiplying the differential from the composite price by 36.5 million, which is the number of barrels of ANS crude that will be sold in an average month.
(2) A single value indicates that the differential is reasonably constant from 1977 through 1981.
(3) A range of values (i.e. 120-145) indicates that the differential varies within this range; an arrow indicates that the differential changes from the first to the second amount from 1977 to 1981.

CHAPTER X

CONCLUSIONS REGARDING INCENTIVES FOR FURTHER ANS DEVELOPMENT

In Chaper IX, this report considered whether Alaska North Slope production would lessen needed incentives for sustaining or enhancing crude oil production in the remainder of the United States and determined that under the assumptions used, it would not do so at all under Scenario II, which approximates the treatment ANS crude would receive if no amendments were made to existing regulations, but would have such effect between June 1978 and September 1981 under some other pricing scenarios, depending on the rate at which OPEC prices will increase. The other portion of Section 8(g)(1) requires the President to report whether the regulation promulgated under Section 4(a) and in effect on April 15, 1977, will provide positive price incentives for the development of the domestic crude oil production of up to 2,000,000 B/D, transported through the Trans-Alaska pipeline.

The question of the appropriate price incentives required to develop the 2,000,000 B/D of crude oil referred to in Section 8(g)(1) is highly speculative at this time for several reasons. First, expansion of the TAPS pipeline above 1.5 or 1.6 million B/D would require the smaller and undeveloped Lisburne and Kaparuk reservoirs to be developed.

No engineering studies have been released on the Kuparuk and Lisburne oil pools. Little information, other than the press releases concerning the results of well tests, is available on these oil pools. However, speculative recoverable reserves are estimated to be in the order of 1.3 to 2.1 billion barrels, versus 9.0 to 9.2 billion barrels of recoverable reserves estimated to be contained

in the Sadlerochit, or main Prudhoe Bay, reservoir, from which production will begin this year.

In the absence of published engineering studies regarding the recoverable reserves in the Lisburne and Kuparuk pools, the magnitude of the development costs which are essential to evaluate the adequacy of price incentives is unknown. However, the Mortada Study* does attempt to make some judgment about the gross magnitudes of reserves and developmental expenses required. Some of the factors which are pertinent are given below.

According to Mortada, the Lisburne reservoir is considered to be a tight formation, which will produce significantly less oil per well than will the main Sadlerochit reservoir. On the other hand, the higher cost per barrel of production would be partially offset by the lower estimated incremental investment required to increase the Trans-Alaskan pipeline capacity to accommodate the higher production that development of the Lisburne reservoir would make possible. Also, the quality of the Lisburne oil is superior to the Sadlerochit, approximately 40° API gravity. On the other hand, Kuparuk oil is significantly lower in quality than Sadlerochit, approximating 22° API gravity, on the order of typical California crude oil.

Unlike the main pool, the two smaller ones are estimated to be able to produce only 1,000 to 2,000 B/D per well compared to 9,000-10,000 B/D in the Sadlerochit. Moreover, secondary and tertiary recovery techniques will have to be used immediately in the smaller reservoirs in order to sustain production rates. This will consist of:

Kuparuk—Water injection or water injection plus carbon dioxide (CO_2)

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* *The Determination of Equitable Pricing Levels for North Slope Alaskan Crude Oil.*

Lisburne—Miscible phase displacement using CO_2 or light hydrocarbons (propane or ethane) from the Sadlerochit gas stream.

The smaller per well production and the need to use enhanced recovery techniques at the outset will result in higher field development costs for the smaller reservoirs than for the Sadlerochit. However, these will be offset to some extent by the lower incremental investments in TAPS required to increase throughput from 1.6 million B/D to 2.0 million B/D.

Levels of Incentives Required

There are several ways in which required incentives can be determined. One is the risk adjusted rate of return. A risk free or other basing rate of return is increased under this approach to account for riskier ventures. The Mortada Study uses a risk multiplier approach which multiplies the actual incurred exploration and development expense by a factor to take into account the number of unsuccessful ventures which must in the long run be "covered" by returns from the successful ones. The "standard" rate of return is then applied to the risk multiplied exploration and development costs.

The Mortada Study assumes a base case where ANS crude sells at levels of Saudi Arabian crude landed on the West Coast. It then computes the rate of return provided by applying a risk multiplier of 4 (i.e., a success ratio of 1 in 7) to industry's expenditures on the North Slope from 1959 to the discovery of Prudhoe Bay in 1968. Different risk multipliers affect the rate of return, as is shown in the following table.

TABLE X-1

RATE OF RETURN WHERE: [1]

Assume 2/3 of oil sold on the West Coast; 1/3 moved East
Import Tier Entitlement

CASE	
R=1	14.0%
R=2	13.0%
R=4	11.8%
R=8	9.9%

The Mortada Study makes the judgment that a 12% discounted real return after income tax would be reasonable, applying the risk multiplier only to increase prediscovery exploration expenditures. In its analysis, making the highly speculative assumptions about recoverable reserves and per barrel rates of production from the Lisburne and Kuparuk pools, Mortada determines that applying a risk multiplier of 3 and a 1976 crude price at Valdez of $11.50 per barrel gives a discounted cash flow, after tax, real rate of return on investments in the Prudhoe Bay Field and in TAPS equal to 12%.

Increasing the risk multiplier reduces the computed rate of return on what is then a larger "risk adjusted" investment. The actual level of risk multiplier which is appropriate in the sense of eliciting continued private sector exploration and development efforts is unknown, and in fact this might vary significantly from company to company, based on an individual corporation's differing individual success rate over time. Similarly, the

[1] The risk multiplier R is computed by the formula R= 1 + .5 (S-1) where S is the inverse of the success ratio in exploration activity, taking into account the Internal Revenue Code which permits the explorationist to write off the cost. For example, if every venture were successful R=1 + .5 (1-1) =1. If one of two ventures succeeded R=1 + .5(1)=1.5. A success ratio of one in seven implies R=1 + .5 (7-1)=4. The multiplier is less than the reciprocal of the success ratio because it considers the tax write offs which reduce the losses on unsuccessful ventures.

actual prospective rate of return which would be necessary for individual producing companies to commit capital to the development of the Lisburne and Kuparuk pools is speculative, and might vary from company to company based on different previous experience in crude oil exploration and development and on other alternative investment opportunities. For example, Mobil owns Marco (formerly known as Montgomery Ward) and other non-crude oil energy investments. Most other producing companies are diversified and have existing investment in coal, uranium and other non-crude oil investment opportunities. Even those who do not wish to diversify into non-crude oil areas still have the opportunity to purchase additional leases and to develop other non-North Slope Alaskan existing properties.

Hearing Testimony on the Mortada Study

ARCO. Several of the ANS producers testified regarding the Mortada risk multiplier and rate of return assumptions. Atlantic Richfield Company (ARCO) testified regarding the rate of return to be allowed on investments made to date at Prudhoe Bay and the rate of return required to promote further testing and development of the Kuparuk and Lisburne formations and to encourage further exploration on the North Slope. In ARCO's view the Mortada Study, while analytically sound, used risk factors that were too low. (The risk factor of R=3.0 to 4.5 used by Mortada is equivalent to success ratios of 1 successful well in 5, to 1 in 8.) ARCO, as well as other respondents to the Notice of Inquiry which elicited the testimony, took issue with the use of this low a risk factor, which Mortada had stated had been reduced because of the Department of the Navy's intensive exploration program carried out on Naval Petroleum Reserve 4 from 1944 to 1953. Mortada felt that the Navy program had contributed significantly to the geological knowledge of the North Slope and that this

should reduce the applicable risk factor. ARCO did not agree with Mortada that the Navy's exploration of NPR-4 had significantly reduced industry's risks, in that neither the Navy nor the U.S. Geological survey had performed any seismic, gravity or surface geology work which covered or was related in any way to the Prudhoe Bay structure. The closest Navy discovery to the Prudhoe Bay field was the producible, but uneconomic in ARCO's view, discovery at Umiat, over 100 miles from the Prudhoe Bay discovery well. On the basis that only one exploratory well in ten finds any commercial reserves, and that only 1 in 50 makes a discovery as large as one million barrels of oil or six billion cubic feet of gas, ARCO felt that a risk factor of 1 in 10 would be extremely conservative for ANS crude.

ARCO also took issue with the Mortada rate of return assumptions regarding the Lisburne and Kuparuk formations, stating that Mortada had overstated the rate of return to be earned from these pools by failing to charge them their full proportionate share of pipeline transportation costs. ARCO felt that to credit all the benefits of reduced pipeline tariffs only to the Lisburne and Kuparuk formations was inappropriate in computing the rate of return, as each property should, in ARCO's view, bear its proportionate share of transportation costs because of differences in ownership shares and the possibility of other commercial discoveries being made on the North Slope.

Exxon. Exxon testified that the Navy's NPR-4 exploration prior to 1953 increased, rather than reduced, the risk factor associated with the Prudhoe Bay discovery. Exxon stated that only 1 of the 37 wells drilled by the Navy encountered the Sadlerochit formation and in that test the sand was found to have a low permeability and showed no evidence of oil. Although some oil shows were obtained in other wells, no commercial discoveries were made by the Navy in its extensive program.

Exxon also criticized the Mortada risk multiplier as being extremely low, stating that many times more than eight attempts per exploratory success were required, even in a basin which had proved productive. Exxon criticized the apparent failure of the study, in its view, to apply the effect of exploration cost increases since 1963 to the finding cost of Prudhoe Bay. Exxon also criticized the assessment of risk on the basis of a single exploration basin, noting that the success in one basin must offset failures in others, such as the Destin Anticline off Florida where expenditures of over $1.11 billion in 1973 resulted in drilling nothing but dry holes.

Sohio. Sohio included in its testimony the text of a letter from the Manager of Exploration Economics for BP Alaska, Inc., who was involved as a geologist in the early 1960's in the exploration which led to the discovery of the Prudhoe Bay Field. His letter stated that the Navy's intensive NPR-4 exploration program had, if anything, increased the risk factor due to the very negative results of the program. It had concentrated on different geological formations lying above all the producing horizons in the Prudhoe Bay area. The only well to reach the Sadlerochit Group sandstones had been found to be tight and water-wet. Not only were the reservoir targets different than those which eventually proved successful but were also of a different structural type. According to the letter, the Navy's plans were concentrated in the large well-defined surface anticlines of the Northern Foothills, whereas the Prudhoe Bay and Colville structures, which are geographically distant, were associated with a broad coastal uplift not apparent from the surface and could only be defined by using specialized and advanced geographical techniques.

Sohio suggested, therefore, that the risks in arctic resource development were and are greater than might be inferred from Mortada's figures.

State of Alaska Department of Revenue. The State of Alaska suggested that the Mortada Study had a serious failing in computing the rate of return. In analyzing the question, Mortada had, according to the State, aggregated into one cash flow all the investments for TAPS and for the Sadlerochit, and had estimated expenditures for the Lisburne and Kuparuk. This was inappropriate in the State's view, because the additional hundreds of millions of dollars which would have to be spent on Lisburne and Kuparuk would have to be self-justified.

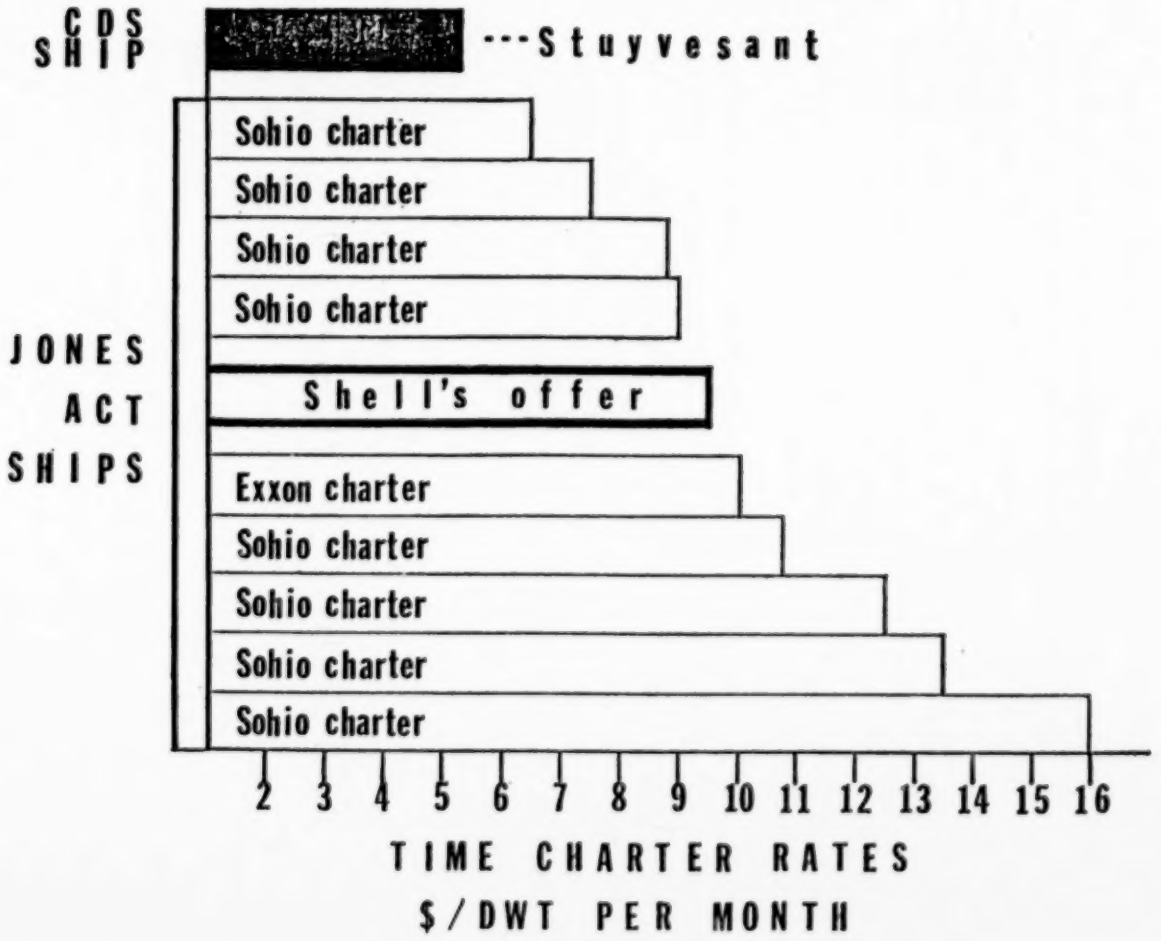
Already made investments in TAPS and Sadlerochit represented sunk costs. The State's figures indicated an $11.31 to $13.00 price in 1976 dollars would be necessary to provide Mortada's after tax 12 percent rate of return for the Lisburne and Kuparuk pools.

Morgan Stanley & Co., Inc. Morgan Stanley, investment bankers for Sohio, Exxon, Mobil and BP, testified that Mortada's 12% return figure, if projected from the outset, might have precluded financing the project. Morgan Stanley suggested that the 12% return figure might be appropriate for regulated industries where an exclusive franchise assured such a return. However, no one was assuring the price of Alaskan or world oil. Morgan Stanley suggested that in its experience no oil company would undertake a project involving any significant risk for a projected return of under 15%. Morgan Stanley stated that the industry will earn returns of approximately 22% in the British North Sea, where they have experienced retroactive majority participation by the British Government. Further, financial institutions investing in equity of leased tankers for the Valdez trade backed my "hell-or-high water", all events charters from the oil companies, will earn 15%. In this context Morgan Stanley could not accept a 12% return as equitable for the North Slope project.

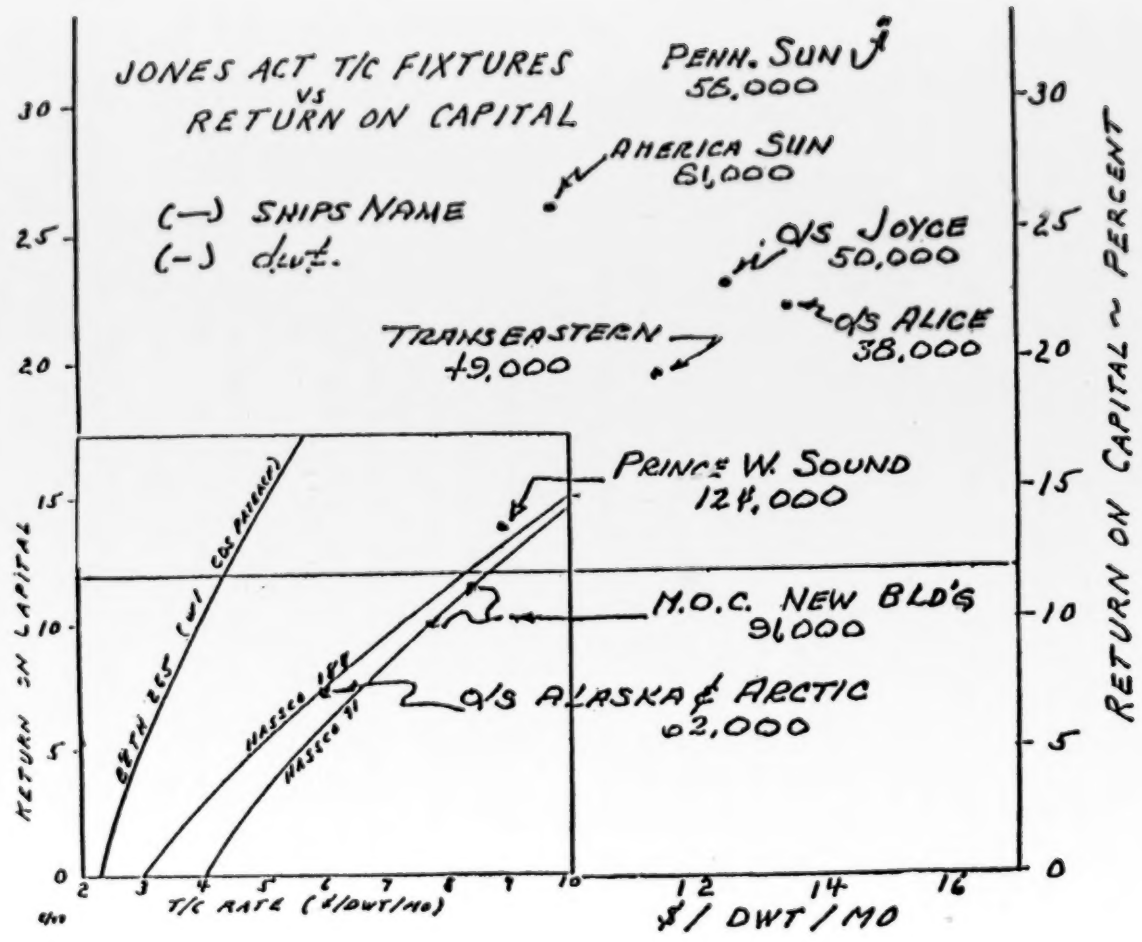
FEA Approach

It is apparent from the foregoing that any effort to determine the appropriate level of prices for ANS oil that will provide a fair return on existing investments and provide incentives for further development is fraught with uncertainty and speculation. The same has been true of prior efforts to establish with precision the extent to which EPCA and prior FEA rulemaking provide sufficient incentives for further development of non-ANS resources.

In any event, FEA intends to further analyze the information that is available on this subject before issuing a proposed rulemaking that will establish prices and entitlements treatment for ANS production, and will announce in that proposed rulemaking its tentative conclusions on the appropriate level of ANS wellhead prices.


CDS SHIP
---Stuyvesant
Sohio charter
Sohio charter
Sohio charter
Sohio charter
JONES ACT SHIPS
Shell's offer
Exxon charter
Sohio charter
Sohio charter
Sohio charter
Sohio charter
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
TIME CHARTER RATES
$/DWT PER MONTH

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JONES ACT T/C FIXTURES
VS
RETURN ON CAPITAL
(—) SHIPS NAME
(-) d.w.t.
PENN. SUN
56,000
AMERICA SUN
61,000
O/S JOYCE
50,000
O/S ALICE
38,000
TRANSEASTERN
49,000
PRINCE W. SOUND
124,000
M.O.C. NEW BLD'S
91,000
O/S ALASKA & ARCTIC
62,000
BETH ECS (w/ CDS PREMIUM)
HASSCO 1ST
HASSCO 2ND
RETURN ON CAPITAL
T/C RATE ($/DWT/MO)
$/DWT/MO
RETURN ON CAPITAL ~ PERCENT

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Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM KARAS

I am William Karas, a member of the firm of Galland, Kharasch, Calkins & Short representing plaintiffs Alaska Bulk Carriers and Trinidad Corporation in this case. The firm represented parties who filed opposition in Docket S-565 with respect to the July 8, 1977 application of Polk Tanker Corporation. I make this affidavit with respect to the following matters based on my personal knowledge of the facts stated.

1. In response to discovery requests made by plaintiffs, the Government has supplied, inter alia, the following documents, copies of which are attached hereto:

Opinion of Maritime Administration General Counsel dated December 10, 1970 with respect to Seatrain Lines, Inc. proposal.

Letter of September 8, 1964 from the Secretary of Commerce to Grace Line, Inc. with respect to a Grace Line proposal for repayment of subsidy.

2. The Maritime Administration has also supplied the firm with a copy of an opinion of the Acting General Counsel, Maritime Administration, with respect to an application of Grace Line Inc. of June 15, 1964. A copy is attached.

3. Copies of (a) the application of Polk Tanker Corporation dated August 25, 1977 requesting certain actions with respect to the TT STUYVESANT, (b) the August

26, 1977 letter of Polk Tanker Corporation withdrawing the July 8, 1977 application, (c) two letters each dated August 31, 1977 from the Maritime Administration/ Maritime Subsidy Board to Polk Tanker were supplied to the firm by the agency only at our request made after we learned of the agency's actions through a press release dated September 1, 1977 issued by MarAd. Until the press release came to our attention, we received no notice of these documents or of the agency's actions set forth in the August 31, 1977 letters.

/s/ William Karas
WILLIAM KARAS

Signed and sworn before me
this 12th day of October, 1977

/s/ [Illegible]

Notary

My Commission Expires: April 30, 1982

UNITED STATES GOVERNMENT
U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

DATE: July 28, 1964

In reply refer to:

Memorandum

TO : Chairman, Maritime Subsidy Board

FROM : Acting General Counsel

SUBJECT: GRACE LINE INC.—Application of June 15, 1964, for modification of contracts applicable to the SSs SANTA ELINA and SANTA LEONOR to free the vessels from the restrictive provisions included pursuant to Section 506 of the Merchant Marine Act, 1936, as amended, and for permission to sell them to a United States operator for operation in the domestic trade of the United States

The question has been asked as to whether the Maritime Subsidy Board has the legal authority to amend Construction-Differential Subsidy Contracts Nos. FMB-89 and FMB-90 to remove from those contracts between the Federal Maritime Board and Grace Line Inc. the provisions incorporated therein pursuant to Section 506, Merchant Marine Act, 1936, as amended. We are advised that the continuation of the contract provisions required by Sections 503 and 802 involving U.S.-flag documentation and the Government's requisitioning authority are not at issue.

It is my opinion that if Grace repays to the Government the unamortized construction differential subsidy paid by the Government for their reconversion the Maritime Subsidy Board may, without any legal objection, amend Con-

tracts Nos. FMB-89 and FMB-90 to remove from those contracts the provisions relating to Section 506.

Section 506, as amended by Public Law 86-518 reads as follows:

> "Sec. 506. Every owner of a vessel for which a construction differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of

the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period."

The "economic life" of a vessel was established initially by the Merchant Marine Act, 1936, at 20 years. In Public Law 86-518 (1960) the "economic life" of vessels was extended to 25 years (except for liquid bulk carriers).

Public Law 88-225 further amended Section 506 to add the following to the contract amendment provision:

"Provisions in such contracts affecting vessels covered by this Act providing for refund of construction-differential subsidy for domestic operations under section 506 of the Merchant Marine Act, 1936, and costs of national defense features for commercial use shall be amended so that for such refund payments made for the period after December 31, 1959, the base upon which such refund payments are computed annually thereafter shall be the undepreciated amount of subsidy or the national defense feature, as the case may be, as at December 31, 1959, divided by the years of life of the vessels as provided under this Act, remaining after December 31, 1959."

The effect of this amendment was to provide the same formula for Section 506 that had previously been provided for other sections of the 1936 Act.

In the course of the hearings before the Senate and House Committees in April and July, 1963 on identical bills S. 1172 and H.R. 6813, (which became Public Law 88-225) the Maritime Administrator, Mr. Alexander, stated:

"We also believe that the obligation to repay construction-differential subsidy for operation in domestic trade was intended to be, and should be, terminated at the end of the economic lives of the vessels."

In enacting Public Law 88-225, there was not included in its provisions a proposed specific provision for the termination of payments at the end of the vessel's statutory life. The Senate Committees explanations for the elimination of this specific provision from the bill as enacted (Public Law 88-225) was for the reason that such provision was unnecessary in that the amortization formula prescribed made it clear that no refunds of construction subsidy would be required after the vessel's statutory life. Attached is a copy of a letter of February 5, 1964, of the Maritime Administration's General Counsel to Matson Navigation Company stating that it is our opinion that the obligation to repay the subsidy for domestic operations ends with the vessel's statutory life.

It is to be noted that Section 506 as originally enacted read as follows:

"SEC. 506. *It shall be unlawful to operate any vessel for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade,* or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe an amount which bears the same proportion to the construction subsidy theretofore paid or agreed*

to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the *temporary* transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer; PROVIDED, That no operating-differential subsidy shall be paid during the duration of such temporary or emergency period, and such period *shall not exceed three months.* Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year." (Underlining added).

In the 1938 amendments to the Merchant Marine Act, 1936, Section 506 was rewritten and the language dealing with a consent to operate in domestic trade if unamortized subsidy is repaid was dropped out.

The House Merchant Marine and Fisheries Committee in commenting upon the amended Section 506 stated: (H.R. Report No. 2168-75th Congress, 3rd Session)

> "Section 506 deals with the services upon which vessels which have been built with a construction-differential subsidy may operate and provides for the repayment of proportions of the subsidy in case the vessel is used otherwise. The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade, and, if the vessel is operated in the domestic trade on certain definitely stated services, to repay certain proportions of the subsidy. If the vessel is used, with the consent of the Commission, in the domestic trade in services other than those enumerated, *the obligations of the owner to repay part of the subsidy are clearly defined.*
>
> "*No fundamental change in the original purpose of the section has been effected.*" (Underscoring supplied).

The Committee on Commerce in reporting on the amended language of Section 506, stated (S. Report No. 1618—75th Congress, 3rd Session):

> "Section 506 has been entirely rewritten *to remove ambiguities and confusion.*
>
> "This section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission other than exclusively in foreign trade or in other enumerated voyages to foreign ports which may include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These

provisions are definite. The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the construction-differential subsidy. *It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months.*

"As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports en-route to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period.

"It is believed that the section, as rewritten, will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic." (Underscoring supplied).

In our view, the quoted portions of the legislative history of the 1938 amendments demonstrate that Congress intended to clarify the domestic services which were authorized and to remove any question of the authority for

temporary periods of domestic operations, all of which would clearly require repayment of subsidy. However, there is no indication that these changes were intended to preclude elimination of such partial repayments of subsidy if the Government is willing to consent to a lump sum repayment of subsidy based upon the same formula of recovery that is provided for shorter periods. Accordingly, it is my opinion that the rewording of Section 506 is not to be construed as an intent to ban an amendment of a construction-differential subsidy contract to permit domestic operation upon repayment to the Government of the unamortized construction-differential subsidy and that the elimination of the exclusive foreign trade obligation can be effected by the expiration of the vessel's statutory life or by the repayment of the unamortized subsidy.

As has been noted, we have already expressed the opinion that no repayment of subsidy for domestic operation is required after a vessel reaches the end of its statutory life cycle. The question now is whether an owner may "accelerate" his vessel's release from the Section 506 restrictions by prepayment of the unamortized (or undepreciated) balance of the Government's subsidy contribution.

The American operator in the domestic service is required by law to build his ship in an American shipyard; that is, he is required to pay the full domestic price of his ship. Since the Owner, aided with the grant of Title V construction-differential subsidy, secures his ship at a cost equivalent to a foreign price (domestic price less the subsidy granted by the Administration), the Owner is required by Section 506 to, in effect, pay the domestic price if the ship is operated in the domestic trade. This is accomplished by a repayment to the Government of the subsidy applicable to that proportion of the vessel's statutory life during which it is operated in the domestic

trades. The inclusion in the computation of revenues applicable to the domestic leg is designed to provide a reasonable criteria of repayment on the basis of benefits to the Owner by virtue of domestic calls on a foreign route. Upon the basis of the rationale for the repayment of subsidy, it appears that if the Government receives the full benefit of its subsidy by the Owner's operation in the foreign trade and the compliance with the other construction differential subsidy contract obligations for the statutory life of the vessel, or if, in the case of a vessel with an age less than the statutory life, the unamortized subsidy is repaid to the Government, the Owner should be in the same position as if he had paid the full domestic price; that is, he should not be required to make further repayments, and should not be bound to an exclusive foreign trade obligation. Stated another way, the repayment in full of any undepreciated balance (based upon the statutory life cycle) of the subsidy, would place the Owner of a vessel on which construction-differential subsidy has been paid in the same relative position as a domestic carrier who had paid the U. S. costs for his ship. We think this is indicated by the last sentence in the above-quoted Senate Report No. 1618, 75th Congress, 3d Session, that the repayment provisions "will protect the interests of the Government and those of the carriers, both foreign and domestic."

In summary, it is my opinion that if Grace repays to the Government the unamortized construction-differential subsidy paid by the Government for the reconversion of the SS SANTA ELIANA and the SS SANTA LEONOR, there is no legal objection to the amendment of Contracts No. FMB-89 and No. FMB-90 to remove from these Contracts the Section 506 provision.

/s/ Graydon L. Andrews
GRAYDON L. ANDREWS

[SEAL]

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

LEGAL OPINION

Date: December 10, 1970

Reply to
Attn of: 220

Subject: Seatrain Lines, Inc.—Domestic operation of vessels in the domestic trade upon repayment of construction-differential subsidy

To: 520

By memorandum dated November 12, 1970, you advise that Seatrain, in connection with an application on behalf of its wholly-owned subsidiaries for CDS under Title V of the Merchant Marine Act, 1936, as amended, to aid in building two 230,000 DWT tankers, has, among other things, made the following statement:

> "In the event Alaska or other domestic movements require these vessels, they can be diverted to the domestic trades with the Maritime Administration's approval for up to six months in each calendar year when required upon repayment of a proportionate share of the CDS. They could be diverted to the domestic trade for their full economic life upon repayment of the full unamortized portion of the CDS."

The question asked in your memorandum is as follows:

> "Please advise whether Seatrain's proposal, namely the *permanent* operation of the vessels in the do-

mestic trade upon the repayment of the unamortized portion of CDS, is in conflitc with Section 506 and the basic policies of the Act itself."

It is my opinion that the foregoing proposal, which is part of an application for CDS, conflicts with the basic purposes of the CDS provisions of the Act. While it is true that section 506 does provide for the possibility of six months of domestic operation each year, and the Comptroller General did permit the lifting of the section 506 domestic restrictions upon repayment of the unamortized CDS on two ships which had previously been converted to carry containers, it would not be proper to base consideration of the initial application for CDS upon an assumed agency exercise of discretion to permit six months of domestic operation each year, or upon a holding by the Comptroller General applied in a single instance involving old ships which no longer had any economic use to the owner.

Section 506, in the second sentence thereof, provides that a ship built with CDS may be transferred to a service other than the services enumerated in the first sentence with the consent of the Maritime Subsidy Board for a period not exceeding six months. Seatrain's proposal indicates that the tankers could, if needed in the Alaska or other domestic trades, be transferred to such trades for up to six months each year with a proportionate payback of CDS.

The legislative history of section 506 shows that this provision for transfer was intended for emergency or temporary purposes. As originally enacted, section 506 provided in part as follows:

> "If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months."

While the specific references to a transfer for emergency and temporary purposes were not retained in a 1938 amendment, Congress intended no essential change. In H.R. Report No. 2168, the House Committee on Merchant Marine and Fisheries stated the following:

> "No fundamental change in the original purpose of the section has been effected."

The Senate Committee on Commerce in S. Report No. 1618 said as follows regarding the amendment to section 506:

> "It is believed that the section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic."

Since the provision for transfer to other services than those enumerated in the first sentence of section 506 is intended for emergency or temporary purposes, it would appear to be inconsistent with this intention to base the necessary findings for a CDS award ~~on~~ transfers of a non-temporary or emergency nature and which might involve a total period equal to one-half the economic life of each ship if six months of each year involved domestic operations.

Seatrain's proposal also suggests that the tankers could be operated without restriction in the domestic trades upon repayment of the full unamortized portion of the CDS. Neither section 506 nor any other provision of the Act relating to the CDS provides for releasing a CDS built ship from the domestic trade restrictions imposed

by section 506 upon repayment of unamortized CDS. However, in a decision letter dated September 30, 1964 (B-155036) the Comptroller General concurred in the opinion of the Department of Commerce that the Maritime Subsidy Board had the authority to amend construction-differential subsidy contracts to free the ships built with the aid of subsidy granted under such contracts from the restrictive provisions incorporated therein pursuant to section 506. Apparently Seatrain, in proposing the possibility of entirely lifting the section 506 restriction, is relying upon the Department opinion and concurrence by the Comptroller General.

While it is acknowledged that this opinion and concurrence therein did permit the lifting of the section 506 restriction from existing ships in a particular instance, it would appear inconsistent with the basic purpose of CDS to build ships for the U.S. foreign trade to consider an application for CDS based on initial acceptance of the premise that at any time after the building of the ships, the operator might obtain a release from the section 506 restrictions by repayment of unamortized CDS. Furthermore, since the opinion and concurrence related to the authority of the Board to amend contracts, it would be necessary to establish in any particular instance that some consideration would flow to the Government as an integral part of an amendment lifting the section 506 restrictions. To approve an application for CDS on the basis proposed by Seatrain would, in effect, bind future Boards to exercise a discretionary authority without any regard for whether, in the future, the Government would receive adequate consideration in exchange for the lifting of the restrictions. The consequence of Seatrain's proposal, if accepted, would be to convert a matter of future exercise of discretionary authority by the Board into a present right of Seatrain, at its option, to lift the restrictions by CDS repayment.

Such a result is not in keeping with the basic policies of the Act and conflicts with the scope of discretionary authority intended to be vested in the Board.

/s/ H. Clayton Cook, Jr.
H. CLAYTON COOK, JR.
General Counsel

QM91/125-23:640

September 8, 1964

Grace Line Inc.
3 Hanover Square
New York, New York 10004

Gentlemen:

Receipt is acknowledged of your letter of August 27, 1964, returning the carbon copy of my letter notice to you of August 7, 1964, advising of the action taken by the Maritime Subsidy Board on August 5, 1964, relating to the SSs SANTA ELIANA and SANTA LEONOR. The copy of the letter notice was signed by your Mr. H. R. Logan, indicating the acceptance of the action by Grace Line Inc.

You note that the action to free the vessels from the provisions of Section 506 of the 1936 Act was based on the condition, among others, that repayment to the Government of the unamortized construction-differential subsidy applicable to the reconstruction of the vessels be made in cash. In regard to this condition, you quote part of your letter of June 15, 1964, to the effect that if the cash received on the sale of the vessels was insufficient to pay the total amount due, Grace Line be permitted to give the Government interest-bearing notes for the balance due and that Grace Line would assign to the Maritime Administration a primary position upon any first-preferred mortgages placed on the vessels. In line with such proposal you request an opportunity to review with the Maritime Administration the actual terms of repayment of construction subsidy at a later date.

You are advised that consideration was given to the repayment proposal as outlined in your letter of June 15, 1964. However, the 1936 Act apparently did not contemplate the acceptance of notes in favor of the Govern-

ment in a transaction of this nature involving the financing of a vessel for operation in the domestic trade of the United States.

Sincerely yours,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

cc: 101 115 200 240 300 400 430 539 600 601 630 640 800 10002 Mr. E. Russell Ints—Wash., D.C.

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF EDMOND J. FITZGERALD

DISTRICT OF COLUMBIA ss.:

EDMOND J. FITZGERALD being duly sworn, deposes and says that:

1. My name is Edmond J. Fitzgerald and I am employed by the Maritime Administration, an agency within the United States Department of Commerce. My present official title is Acting Director, Office of Ship Financing Guarantees, which office I have held since August 16, 1977. My official, ongoing position is Supervisory Examiner, Ship Financing Guarantees. From August 1973 to August 1977, I was Assistant Division Chief, Division of Ship Financing Guarantees. Prior to assuming those duties, I was a Senior Examiner, Ship Financing Guarantees in the same Division from June 1971 to August 1973. From August 1969 to June 1971, I was a Senior Financial Analyst with Xerox Corporation. From October 1966 to August 1969, I was a Senior Financial Analyst with the Ford Motor Company. From April 1964 to October 1966 I was a Mortgage Insurance Examiner in the Division of Mortgage Insurance Contracts of the Maritime Administration. From December 1960 to April 1964 I was a Marine Insurance Examiner with the Maritime Administration's Division of Marine Insurance.

2. At my direction, and under my personal guidance, trained and experienced professional staff in the Office of Ship Financing Guarantees have analyzed the potential

cash flow differential of financing the payback of construction-differential subsidy (CDS), using the present note arrangement compared with the cash flow impact of financing the CDS payback utilizing Title XI guaranteed financing pursuant to Section 1104(a)(3) of the Merchant Marine Act, 1936, as amended.

3. If on September 30, 1977, Title XI bonds had been issued for the STUYVESANT on the $27,200,000 construction-differential subsidy repaid, it was my opinion that an interest rate of 8.05% could have been obtained. Including the Title XI guarantee fee of 3/4 of 1%, the total rate would have been 8.80%. On a level debt service basis this would result in annual payments of principal and interest amounting to approximately $2,914,700 (rounded to the nearest hundred). This figure was arrived at by interpolating between 8.75% rate and 8.875% rate on an interest table. The annual payments of principal and interest actually achieved on the construction-differential subsidy note repayment amount [sic] to $2,738,300 (rounded to the nearest hundred). The difference between these two payments is only $176,400 per year. About $155,655 of this difference would represent the ¾ of 1% statutory fee by the Maritime Administration for the grant of Title XI financing. The remainder of $20,745 would insignificantly affect the competitive posture of the plaintiffs.

/s/ Edmond J. Fitzgerald
EDMOND J. FITZGERALD

Subscribed to before me this 18th day of October 1977.

/s/ Joan A. Bryan
Notary Public

My Commission expires: July 31, 1979

[SEAL]

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

SUPPLEMENTAL AFFIDAVIT OF RUSSELL F. STRYKER

DISTRICT OF COLUMBIA) ss.:

RUSSELL F. Stryker being duly sworn, deposes and says that:

1. My name is Russell F. Stryker and I previously executed an affidavit on September 28, 1977, for use in connection with these consolidated actions. Since that date the plaintiffs, both in filings and oral argument before the Court, have disputed the contents of my earlier affidavit. Particular attention has been given to Appendix D of Shell Oil Company's Motion for Summary Judgment comprised of an affidavit of Charles E. Dunagan, and its accompanying Tab B, "a Federal Energy Administration study entitled 'Equitable Sharing of North Slope Crude Oil,'" and Tab C, entitled "President's April 15, 1977 Report to Congress on the Pricing of Alaska North Slope (ANS) Crude Oil." The purpose of this supplemental affidavit is to reassert the conclusions of my original affidavit with respect to: Trans-Alaskan Pipeline System (TAPS) throughput volume; amount of TAPS oil to be delivered to ports on the Pacific Coast of the United States; and the shipping capacity needed to

transport the TAPS oil both to ports on the Pacific Coast of the United States and to the Republic of Panama or offshore the Republic of Panama for transshipment through the Panama Canal primarily to ports on the Gulf Coast of the United States.

2. Shell Oil Company in the affidavit of Charles E. Dunagan and other documents presents the view that the supply of domestic tankers available for the transportation of Alaskan North Slope (ANS) crude to the West Coast and particularly Panama, equals demand. Plaintiffs contest the magnitude of the Maritime Administration's currently determined deficits.

3. The Maritime Administration very recently has assessed the tanker transportation needs and concluded that *less* domestic fleet tonnage is available for the transportation of crude from Alaska to Panama than is required. The deficit has been determined to be about five hundred thousand deadweight tons (500,000 DWT), as explained in my previous affidavit. An earlier assessment by the Maritime Administration (October 21, 1976) referred to by plaintiffs, and based on data available a year ago, also indicated a domestic fleet deficit but it was thought to be in the neighborhood of 280,000 DWT shortfall (See table on page vii). Based upon both the previous and current estimates there is a need to supplement the non-subsidized domestic fleet with vessels from the foreign trade fleet built with construction differential subsidy (CDS). The STUYVESANT, a vessel built with CDS, is needed for the transportation of ANS crude to Panama.

4. In reviewing the bases for the Maritime Administration estimate, several factors must be kept in mind.

(a) All of the ANS crude cannot be sold to refinery operators on the West Coast of the United States. This is true because:

—ANS crude is relatively high in sulfur content.

—It has a relatively higher volume of low value product after refining and a consequent low volume of high value product such as gasoline.

—The existing refinery equipment on the West Coast must be modified at high cost if ANS crude is to be refined in large quantities.

—Because of these characteristics of ANS crude, the most likely oil to be displaced is light oil from the Persian Gulf.

—It is estimated (President's Report, page 22) that ANS crude must be priced 10 to 40 cents, for an average of 20 cents, a barrel less than Persian Gulf light to be competitive. Persian Gulf light is now selling for $13.50 a barrel. Sohio/BP, the major vendor, is selling ANS crude for $13.30 to $13.40, an average difference of 15 cents a barrel. (Petroleum International Weekly, August 15, 1977, page 2.)

(b) The earlier Federal Energy Administration forecast of sales (Dunagan affidavit, page 4) based sales estimates on maximum alteration of refinery equipment *and* a 25 cent difference in price. For these reasons high ANS West Coast sales were forecast at that time by the Federal Energy Administration (FEA). Based on current price and sales information, the Maritime Administration concludes that less will be sold.

(c) Oil not sold on the West Coast must be shipped from Alaska to Panama and from there transshipped to the Gulf and East Coasts.

(d) A lower estimate of West Coast sales results in an increased shipping requirement.

(e) The reduction in forecasted West Coast sales based upon the current price situation is the foundation

for the Maritime Administration conclusion that more oil must be shipped to Panama and, therefore, that more ships are needed.

(f) This view of West Coast sales potential is not solely held by the Maritime Administration, as shown on page 1 of the testimony attached to this affidavit. Before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, House of Representatives, September 30, 1977, Federal Energy Administrator O'Leary indicated that only 600,000 to 700,000 barrels a day of ANS crude will be sold to West Coast refiners. This is substantially lower than the earlier FEA estimate of 850,000 to 950,000 barrels per day made in April of 1977. Employing the pipeline delivery value for the third quarter of 1978 (1,350,000 barrels a day) used by the Maritime Administration in my previous affidavit, and the current FEA *high* estimate of West Coast sales at 700,000, the transportation requirement to Panama is 650,000 barrels a day. This is very close to the Maritime Administration figure of 675,000 barrels a day in my previous affidavit. The FEA low estimate produces a transportation requirement of 750,000 barrels a day, which is substantially in excess of the Maritime Administration estimate.

(g) Federal Energy Administrator O'Leary's estimate of 1.2 million barrels rate is for March 1978 appears on the same page in his statement. My previous affidavit set a rate of 1.35 million barrels, but I specified the third quarter of 1978. It is my considered opinion that the rate will be at or about the latter figure for the later third quarter of 1978.

5. Considering the changing nature of the marketing situation and delivery rates of ANS crude, it is unrealistic to cling to dated forecasts, either twelve or six months old, after new data has become available. The Maritime Administration, in the interest of employing the most realistic assessment of shipping requirements, has made prudent adjustments in the forecasting variables used. The new values used by Federal Energy Administrator O'Leary indicate that that agency, too, has revised its forecasts based upon newly available data.

/s/ Russell F. Stryker
RUSSELL F. STRYKER

Subscribed to before me this 18th day of October 1977.

/s/ Joan A. Bryan
Notary Public

My Commission Expires:

July 31, 1979

[SEAL]

TESTIMONY OF

JOHN F. O'LEARY
ADMINISTRATOR
FEDERAL ENERGY ADMINISTRATION

Before the

SUBCOMMITTEE ON ENERGY AND THE ENVIRONMENT
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

in

Washington, D.C.

September 30, 1977

Mr. Chairman and members of the Subcommittee:

I am pleased to appear before this Subcommittee on the last occasion on which I will testify as Administrator of the Federal Energy Administration. As of tomorrow, the functions of the FEA will be assumed by the Department of Energy, and the views I express today will be those of the Department.

I understand that you would like me to provide our views generally on H.R. 9203 and other proposed legislation that would expedite the approval and construction of west-to-east crude oil transportation systems, and to focus particularly on the impact of such legislation on the Sohio Project.

As you know, the Trans-Alaska Pipeline is currently delivering oil to Valdez, Alaska at the rate of about 700,000 barrels per day (B/D). By March of next year,

with the completion of repairs to the pump station which was destroyed by fire, that rate should increase to 1.2 million barrels a day. We expect that 600,000-700,000 B/D of this volume will be absorbed by refiners on the West Coast, and that the remainder will be transshipped through the Panama Canal to Gulf Coast refiners until an overland transportation system can be built to move Alaskan oil directly from the West Coast to other regions of the country.

The Administration firmly believes that the construction of at least one, and perhaps two, of the proposed west-to-east pipeline systems is urgently needed in order to assure an efficient and economic means of delivering Alaskan crude oil to those areas of the country which need it. While transshipment of North Slope crude oil through the Panama Canal is an acceptable short-term alternative, it is neither as economic nor as efficient, from the standpoint of both producers and consumers, as an overland pipeline system from the West Coast.

In addition to the potential cost savings, there are other reasons why expeditious completion of one or more west-to-east pipeline systems should be a matter of high national priority. As you know, the northern section of the country faces potential crude oil shortages as Canadian imports are terminated and indigenuous production declines. A pipeline from the West Coast to that region will not only transport surplus Alaskan crude but will provide the northern States with access to numerous other sources of crude oil that are necessary to operate their refineries efficiently. A southern pipeline would, in addition to moving the Alaskan surplus, open up new markets to California producers, including the U.S. Government at the Elk Hills Naval Petroleum Reserve. And, perhaps most importantly, it is becoming increasingly apparent that one or more pipelines from the West Coast could be an important predicate to further development

of our vast oil reserves on the North Slope and in the Pacific Ocean. Thus, a west-to-east pipeline system could contribute materially to lessening our dangerous dependence on foreign oil and our persistent balance of payments deficits.

While the Administration is firmly committed to the proposition that the expeditious construction of pipeline systems from the West Coast is essential, it is important to recognize that under existing legislation the Federal Government has very limited and fragmented authority in this area. No general siting authority for petroleum pipelines exists. Instead, a variety of laws that [sic] assign to separate agencies jurisdiction over such diverse matters as pipeline safety, air and water quality, and rights-of-way over public lands. In addition, the States in which pipeline facilities would be located regulate to varying degrees the siting and other aspects of the pipeline and terminal facilities. But in all this myriad of Federal and State involvement, there is no means provided for a comparison of the relative merits of competing applications from the standpoint of their ability to meet national energy objectives. And there is no means provided legislatively to coordinate the decision-making process so as to minimize conflict and unnecessary delay.

Recognizing the resulting complexity of the Federal and State permitting processes for the west-to-east pipeline projects, and in the absence of any formal means of coordination, the Administration determined early this year that a single Federal Project Coordinator should be designated, and Mr. Douglas Robinson, who is with me today, was appointed to that position. Since March of this year, Mr. Robinson has been working informally with the appropriate State and Federal agencies to coordinate and expedite their approval processes.

These informal efforts have been successful in eliminating some unnecessary delays, particularly with respect

to the Sohio Project. But our efforts in this regard, as well as our successful experience in applying the procedures of the Alaskan Natural Gas Transportation Act to arrive at a decision on an Alaska gas transportation system, have brought us increasingly to the view that a legislative framework for a decision on west-to-east oil pipeline routes would provide certain advantages over our present informal coordinating efforts and is therefore in the public interest.

For example, without some form of Federal designation of the route or routes that are most in the national interest, the chances are increased that none of the current proposals would receive all of the necessary regulatory approvals, particularly at the State level. While many State officials recognize their responsibilities to the rest of the country, they may in the end find it politically impossible to approve a particular oil terminal and pipeline project in the absence of a Federal Government determination that such project best serves the national interest. Similarly, it is possible that Canada would not approve transshipment of oil through it without an indication from the U.S. Government that we have determined such transshipment to be necessary.

Even if the States or the Canadian government would eventually approve a pipeline project, Federal route designation could expedite their decisions, by eliminating the need to consider potential alternatives and allowing them to focus all of their attention on the Federally-designated routes. It could also help to expedite approval and construction of a pipeline by requiring coordination between Federal and State decision-making processes and eliminating the potential for unnecessarily protracted litigation.

Federal designation of a route or routes might also assure a more rational and orderly decision than might otherwise occur. As I have indicated, many agencies

are now involved in the permitting process, but none compares the projects on a national interest basis by examining their relative costs or their comparative ability to supply markets where crude oil is needed. Special legislation could establish criteria for the decision which would in effect require this comparative analysis.

H.R. 9203 contains many of the essential elements that we believe should be included in expediting legislation. It is a substantial improvement over S. 1868, H.R. 8568 and H.S. 8627, all of which we believe did not provide enough time and latitude to consider all of the options that are available and to consider and attempt to mitigate the potential adverse impacts on the environment. There are, however, a few areas to which the Subcommittee might give further consideration.

First, neither H.R. 9203 nor any of the other bills contains a mechanism for coordinating State and Federal decisions. We do not understand that any of these bills preempts the existing authority of the States to review and approve these projects under the legitimate exercise of State police powers, and we agree that such preemption is not necessary or appropriate at this time. However, we believe it is possible and desirable to provide a mechanism for Federal-State consultation and coordination that would minimize the potential for conflicting decisions and duplication of effort.

Second, H.R. 9203 provides for no formal contribution to the decision-making process from any Federal agency other than the Departments of Energy and Interior and is confusing as to how the overall decision relates to the issuance of specific permits. Our experience with the Alaska natural gas decision has shown that there are a number of Federal agencies with expertise on particular aspects of pipeline and terminal siting whose views would be valuable and even critical in arriving at a decision. Without such mandatory coordination among

Federal officials particularly, there is the possibility that the Secretary's decision could inadvertently conflict with the requirements of a statute administered by another agency, such as EPA, the Department of Transportation, or the Department of Justice. In addition to providing a consultation procedure, we also think it is necessary to refine the mechanism for coordinating the Secretary's designation of a project with the issuance of specific permits by other agencies. We would therefore recommend that provisions similar to Sections 6 and 9 of the Alaska Natural Gas Transportation Act be included.

Third, we do believe that consideration should be given to the question of whether the Secretary of Energy, rather than the Secretary of the Interior, would be in a better position to assess all of the policy considerations which must be included in the decision, especially since two of the three northern proposals do not include any Federal lands or issues within the usual jurisdiction of the Secretary of the Interior. For those who are concerned that the Secretary of Energy would not give adequate consideration to environmental matters, a possible solution is to give the Secretary of Energy final decision authority but limit his discretion to those routes which have been certified by the Secretary of the Interior as being environmentally acceptable and consistent with proper management of the public lands.

Fourth, with regard to the date for a decision on the northern projects, we believe that the October 15, 1978 deadline contained in H.R. 9203 is more realistic than the February 1, 1978 deadline contained in the other bills under consideration. We still have two concerns about the later date, however. The first is whether the Environmental Impact Statement process can be completed by then, particularly in view of the fact that the Department of the Interior's current schedule calls for the completion of the EIS on the Northern Tier project

in April 1979. We will defer to the Interior Department on whether it can complete its statutory requirements by that date. We believe it should be possible for the other criteria for a decision to be analyzed by that time. Also with respect to the EIS process, since the judicial review provisions apparently prevent challenges to the adequacy of the EIS, consideration might be given to requiring approval of it by the Council on Environmental Quality, much like was done in Section 6(d) of the Alaska Natural Gas Transportation Act.

Our second concern about the decision date has to do with the scheduling of the Canadian approval process and the need to coordinate the U.S. and Canadian decisions. Although the Canadian and U.S. decisions must be made independently, because of the different concerns the two countries have with respect to these projects, we believe it would be appropriate for the U.S. deadline to be as close as possible to the time when the Canadian Government will be making its decision with respect to the routes which would cross Canadian territory. Perhaps a procedure like that contained in the Alaskan Natural Gas Transportation Act, where the President was allowed to delay the decision for 90 days under certain conditions, such as the need to improve the EIS or to coordinate with a Canadian decision, might be considered.

Finally, given the present status of the Sohio Project, we do not believe it is necessary or advisable to include that project within the scope of the legislation, except with respect to the limitations on judicial review. We share the view of the sponsors of H.R. 9203 that the Sohio Project is generally not in competition with the northern projects, and final Federal approval of the Sohio Project therefore does not need to take into account the relative merits of the other projects. In addition to not being necessary, we are concerned that an overall

Federal decision on the Sohio Project would in fact delay its ultimate approval. The Federal Power Commission decision with respect to the abandonment of an El Paso natural gas pipeline for use in the Sohio Project is now expected to be issued on October 12. The Department of the Interior will issue a decision on rights-of-way within a few days thereafter, and the EPA decision on an air quality permit has been carefully coordinated with the State of California's similar procedures for considering the air quality issues. After months of delicate negotiation, a schedule for completion of Federal and State decisions on the project by about December 28 of this year was arrived at during a meeting in Los Angeles this past Tuesday between the Federal Coordinator, Sohio and the various State agencies involved. We think any further Federal intrusion into this process would only unnecessarily complicate matters.

This is an appropriate point at which to turn to a discussion of the major issues and current status of the Sohio Project.

As you may know, any new stationary source of emissions in California must comply with separate Federal and State air quality requirements. That is because the EPA has not yet approved California's implementation plan for new source review and has therefore not yet delegated to the State its authority under the Federal Clean Air Act. In the absence of such delegation, Federal and State air quality regulation exists side by side in California.

Sohio has proposed to locate its terminal in what is termed under both Federal and State law a "non-attainment" area—that is, an area that does not meet minimum Federal and State ambient air quality standards for certain pollutants that have been identified as hazards to health. The Federal and State standards for

oxidants, caused by the reaction of hydrocarbons and nitrogen oxides with sunlight, are exceeded on two out of three days in the South Coast Air Basin. Federal and State standards for particulates are also commonly exceeded, as are the State standards for sulphur dioxide. These four pollutants—hydrocarbons, nitrogen oxides, particulates and sulphur dioxide—would be emitted in significant quantities from the proposed Sohio terminal at Long Beach and related operations.

Both Federal and State law provides that if emissions of regulated pollutants from a new stationary source in a non-attainment area cannot be eliminated by applying controls to the source, they must be offset by reducing at least an equivalent volume of emissions from other sources in the same geographical region. The reductions can be accomplished either by eliminating a source of emissions altogether or by applying control measures to them. The so-called "tradeoff" must consist of a reduction in existing emissions at the tradeoff site to a level below what could otherwise be legally emitted at that site.

Thus, in order for Sohio to obtain an air quality permit from both EPA and the State, it must reduce the emissions from its project as much as possible, then ascertain the amount of the emissions that will remain, despite its best efforts to reduce them, and, finally, provide appropriate offsets of those remaining emissions.

After many long months of negotiation, Sohio and the Federal, State and local air quality agencies have reached a common understanding of the measures that will be taken to reduce emissions from the project and the amount of the emissions that will need to be offset. There is also general agreement on how they will be offset. What remains to be done is for Sohio to work out the details of a tradeoff package with third parties at a cost that is acceptable, and for the Federal and State agencies

to complete the procedural process, including the preparation of a supplement to the State's Environmental Impact Report in order to assure its compliance with State law. There are no major substantive issues left to be resolved. It would still be premature to state categorically that Sohio will receive the necessary air quality permits, but it is at least apparent that all parties are working diligently and in good faith to accomplish that result.

If the tradeoff arrangement that has been generally agreed to can be formalized, the Sohio Project will not contribute to the deterioration of air quality in the Los Angeles basin. On the contrary, it will result in some net improvement even on days when it is in a high operational mode and a substantial improvement on average days. It would also provide a unique opportunity to demonstrate and improve upon frontier technology for the removal of sulphur and nitrogen oxides.

A second issue which, until recently, appeared to present a major obstacle to California's approval of the Sohio Project was whether the abandonment of the El Paso gas line would jeopardize the State's ability to receive potential natural gas supplies from the Southwest. This issue became particularly important over the past four months, after the FPC recommended to the President that Alaskan gas be delivered to California by displacement from the Permian Basin and the Mexican government announced plans to sell as much of 440 million cubic feet a day of natural gas to companies that would deliver it to California and other Southwestern States. The State argued that these sources, plus others that might become available, would place a severe strain on the post-abandonment pipeline capacity from the Southwest.

This issue was effectively eliminated as a barrier to approval of the Sohio Project by the President's decision

on an Alaskan natural gas transportation system. That decision, if approved by the Congress, would provide for the construction of a Western leg that would deliver Alaskan gas directly to California, rather than by displacement. Since the announcement of the President's decision, the California Public Utilities Commission has indicated that it will not pursue its objections to the abandonment of the El Paso line on the ground that it would deprive California of needed capacity. The coordination of the President's Western Leg decision with the Sohio Project was deliberate and came about as the result of intensive consultation between State officials and the Federal Project Coordinator in an effort to reach a mutually satisfactory result.

Thus, we consider the Sohio Project finally to be on track and within reach of final approval by the necessary Federal, State and local agencies. There is still much detailed work to be done. But, as the result of a gradual realization on all levels that the project would fulfill important national energy objectives and that appropriate measures can be taken to minimize potential adverse impact on the environment, the final pieces of the regulatory puzzle are beginning to fall into place.

In summary, I assure you that we in the Department of Energy share your interest in expediting the construction of west-to-east pipeline systems and have been working diligently to that end. We also support the concept of legislation that would allow for a coordinated State and Federal decision-making process.

Mr. Chairman, in view of the short notice we have had of this hearing, we have not had the opportunity to draft specific amendments to H.R. 9203 that would incorporate our suggestions. Mr. Robinson's staff is working on such amendments, however, and perhaps he will be in a position to submit them to the Subcommittee by the time hearings on this subject reconvene next Thursday.

With the modifications we intend to offer, we feel H.R. 9203 could be the proper vehicle for accomplishing the expeditious construction of one or more west-to-east pipeline systems. We look forward to the opportunity to work closely with the Subcommittee and its staff to draft a final bill.

Thank you. I would be happy to answer any of your questions.

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AMENDMENT TO COMPLAINT

Pursuant to Rule 13(a) of the Federal Rules of Civil Procedure, Plaintiff Shell Oil Company hereby amends the Complaint in Civil Action No. 77-1645 by adding the following new paragraph, to be numbered paragraph "33", and by renumbering existing paragraphs "33", "34", and "36" as "34", "33", and "36", respectively:

"33. The MSB decision to waive CDS restrictions on the STUYVESANT and the failure of the Secretary to reverse the MSB decision were not based on the administrative proceedings initiated on July 8, 1977 and August 23, 1977. Both actions were contemplated and shown to defendants and in fact were determined upon by defendants before July 8, 1977. The proceedings are therefore not bona fide and the actions are arbitrary and capricious in violation of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706, and Section 506 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1156."

Respectfully submitted,

/s/ Stephen N. Shulman
STEPHEN N. SHULMAN

/s/ Joseph A. Artacane
JOSEPH A. ARTACANE

/s/ Mark C. Ellenberg
MARK C. ELLENBERG

CADWALADER, WICKERSHAM & TAFT
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Washington, D.C. 20036
202—387-8100

[Certificate of Service Omitted in Printing]

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM KARAS

I am William Karas, a member of the firm of Galland, Kharasch, Calkins & Short representing plaintiffs Alaska Bulk Carirers and Trinidad Corporation in this case. I make this affidavit with respect to the following matters based on my personal knowledge of the facts stated.

1. The following documents, attached hereto under seal have been provided to plaintiffs pursuant to their requests for documents and have been designated by defendants as protected documents pursuant to the protective order of October 7, 1977:

ATTACHMENT 1: Letter of November 3, 1970 from Robert J. Blackwell, Deputy Maritime Administrator to Hudson Drake, Deputy Under Secretary of Commerce.

ATTACHMENT 2: Undated memo of M.E. Parr, Chief, Office of Subsidy Administration.

ATTACHMENT 3: Abstract of Secretarial Correspondence and Attachment 1.

ATTACHMENT 4: Legal Opinion of Elmer E. Metz, Assistant General Counsel of the Maritime Administration dated December 17, 1952.

2. The excised portion of the first full paragraph of page 17 of Plaintiffs' reply Memorandum reads as follows:

> ". . . Information being developed through discovery indicates that the decision to make the STUYVESANT eligible for entry into the Alaskan trade was made long before the application of August 26 and the letters of August 31, 1977. Thus the facts as they existed in August, 1977 were not the decisive considerations leading to MarAd's action, and MarAd's refusal to have any procedures whereby it might consider the effects of its action on Plaintiffs because it had determined to make the STUYVESANT eligible for that trade long before. Further, evidence uncovered in discovery indicates there were improper contacts and influence in violation in connection with the eligibility of the STUYVESANT for the Alaskan oil trade—contacts which violate MarAd's own regulations. 46 C.F.R. § 201.182."

/s/ William Karas
WILLIAM KARAS

Signed and sworn to before me this 20th day of October, 1977

/s/ Marilyn M. Chu
(Notary Public)

My Commission expires: April 30, 1982

ATTACHMENT 1

DEPARTMENT OF COMMERCE
ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: [X] The Secretary [ ] The Under Secretary

From: Assistant Secretary of Maritime Affairs

Subject: Seatrain Shipbuilding Corporation

This memorandum supplements my memorandum to you dated April 1, 1975 regarding the above-captioned subject to provide, per your request, additional details regarding current developments and an estimated time frame applicable to the 225,000 deadweight ton tankers under construction at the Seatrain shipyard.

Potential Purchasers or Charterers of the Seatrain Ships

The Seatrain management has had and is continuing to have extensive discussions with several of the major oil companies, including Standard Oil Company of Ohio (Sohio), Atlantic Richfield Corporation (Arco) and Exxon Company, USA (Exxon), regarding the purchase or charter of the two Seatrain VLCC's under construction for use in the Alaska oil trade. In addition, we have discussed this matter with representatives of the Marine Department of Sohio during the period of the past few weeks. Although Sohio had generally agreed with our determination of the value of the Seatrain vessels as at least equivalent to the capitalized cost of $84 million for each of the six vessels they have contracted for with Avondale Shipyard based on comparative transportation costs, they have not to date given any firm indication of their interest in purchasing or chartering the Seatrain ships. In this connection we believe it is pertinent that

three of the ships which Sohio contracted for with Avondale are cancellable without penalty if cancelled by specified dates—the last two by December 31, 1975 and the fourth ship by June 30, 1975. Under such circumstances, there is no urgency on the part of Sohio to make a prompt decision on this matter.

Joe Kahn of Seatrain advises us that the major oil companies that he has been dealing with have all expressed interest in the two ships, but that he has not yet been able to obtain any definite commitment for purchase or charter. Because of the fact that the Alaskan oil will not start to move until the latter part of 1977, it is questionable that the oil companies will enter into any final arrangements for these vessels at this time.

Control No. ————

SURNAME AND ORGANIZATION

(*Typed*)

RJBlackwell
A/S for MA

INITIALS AND

DATE

[SEAL]

Washington, D.C. 20530

QM1967/L13-3:521
QM1969/L13-3:521

Date: Nov. 3, 1970

Reply to
Attn of: Deputy Maritime Administrator

Subject: SEATRAIN SHIPBUILDING CORPORATION (Seatrain)—Construction Differential Subsidy (CDS) for 230,000 DWT Tankers

To: Mr. Hudson Drake
Deputy Under Secretary of Commerce

Reference is made to your request for our views with respect to granting CDS for Seatrain's proposed 230,000 DWT tankers which are to be built at the Seatrain Shipbuilding Corp. (former Brooklyn Navy Yard).

Background Information

Seatrain, by applications dated May 19, and June 12, 1969, as amended, requested Title XI loan and mortgage insurance on two 230,000 DWT tankers on behalf of two wholly-owned subsidiaries—Langfitt Shipping Corp. (Langfitt) and McRae Shipping Corp. (McRae). The vessels are proposed to be used in the oil trade from Valdez, Alaska, the southern terminus of the proposed Trans-Alaska pipeline to U.S. West Coast ports. On December 29, 1969 the Maritime Administrator made certain findings with respect to these applications which in effect conditionally approved mortgage insurance and denied construction loan insurance on the two vessels. It was anticipated at that time that Langfitt and McRae

would enter into formal Mortgage Commitments on the vessels so as to definitely commit Maritime for insurance of the mortgages, thereby providing them the opportunity to obtain private construction loans. To date, Langfitt and McRae have not made any effort to secure formal Mortgage Commitments from Maritime even though the ships are apparently now under construction at Seatrain's yard. Marad is prepared to formalize its commitments to insure mortgages on these vessels as soon as the applications are completed.

Seatrain, by applications dated June 11, 1970, as amended, requested CDS for two identical 230,000 DWT tankers on behalf of two other wholly-owned subsidiaries —Hase Shipping Corp. (Hase) and Haan Shipping Corp. (Haan). According to the applications these two vessels are for operation in the U.S. foreign trade.

Subsequent to the filing of the applications the principals of Seatrain have indicated that they desire to obtain CDS on the first two tankers to be built at the Seatrain shipyard rather than on the third and fourth vessels as set forth in their formal applications.

Apparently the reason for the "switch" is the delay in the approval for the construction of the Trans-Alaska pipeline. Assuming the pipeline is built, most people feel that completion would not be before 1974-5 and that its capacity would not be reached until several years later. Hence, if the first two vessels were delivered on schedule in 1972 and 1973, there would be no profitable domestic employment for these vessels for at least several years. As a condition to the Title XI mortgage commitment Seatrain is required to bareboat charter the ships for the first three years.

Seatrain would prefer to receive Government construction funds to aid in the building cost of the first two vessels as they believe that these vessels can operate successfully in the U.S. foreign trade with CDS. We further understand that Seatrain may, at a later date, wish to repay a portion of the CDS so that these vessels could also operate in the domestic trade.

Maritime's Views on CDS for 230,000 DWT Tankers Built at the Seatrain Shipbuilding Corp.

We have reviewed Seatrain's various applications which were submitted on behalf of their wholly-owned subsidiaries as well as the Seatrain shipyard itself. As a result of this review, Maritime is *not* in favor of granting CDS for the first two vessels which are to be built at the Seatrain yard for the following reasons:

I. *Budgetary Considerations*:

The Cost of two vessels is estimated by Seatrain at $94,500,000, plus escalation, and in their application Seatrain requested CDS for 50% of the construction cost or $47,250,000. Under the provisions of the new maritime legislation the guide-line percentages for CDS are 45% of an approved negotiated price for contracts awarded in fiscal year 1971 and 43% if contracted for in fiscal year 1972. Accordingly, the CDS funds involved for these two vessels would be in the range of $40,000,000 to $42,500,000, plus escalation, depending on the year in which the contract was awarded.

Marad's fiscal year 1971 budget for CDS is approximately $199,000,000 and for fiscal year 1972 the requested budget level is about $230,000,000. The 1971 budget contemplates commitments for 27 new vessels on a multi-year procurement basis, of which the Government's share of the cost of 19 vessels would be funded in FY 1971 and the remaining 8 vessels funded from CDS appropriations of a subsequent year. This will be the first year of the President's new Maritime Program which calls for the building of 300 new merchant ships over the next

10 years at the rate of 30 ships per year. The commitment for construction of only 27 ships in FY 1971 and funding only 19 of these ships is considerably below the program level, but was mandated by the current Government fiscal restraints. For FY 1972, the projected CDS budget of approximately $230,000,000 will provide for negotiating for construction of 30 merchant vessels on a multi-year procurement basis but funds for only about 22 vessels.

As is readily apparent from the foregoing, award of CDS to aid in the construction of two Seatrain giant tankers at upwards of $20,000,000 per ship in either of these fiscal years would further seriously impair the Government's goal as mandated in the President's new Maritime Program in terms of the number of ships to be built during the early stages of the new program.

II. *Variance From Criteria of New Shipbuilding Program*

The Seatrain 230,000 DWT tankers being considered herein do *not* meet the criteria considered most promising for the U.S. foreign trade in the 1970 to 1980 period. Based on Marad's CMX project (Merchant Ships for the 1970's), in which Newport News Shipbuilding Co., Bath Iron Works and Marad's staff participated, we are of the opinion that CDS funds should be spent on more versatile and productive ships—namely combination bulk oil and ore carriers (OBO), container vessels and barge carrying ships. Further, the largest practical tanker considered by the CMX project was 120,000 DWT.

In an effort to reduce the construction cost of vessels and improve construction procedures, Marad is encouraging "standardized" vessels. The demand for American tankers of this size in the U.S. foreign trade, as well as the domestic trade, is so limited (see Section on "Foreign Trade") that a production run of 10 to

20 tankers in the 230,000 DWT range seems most remote as compared to other type vessels competing for CDS funds. In the relatively unlikely event that a sufficient demand were to develop for tankers in the 230,000 DWT range, so as to justify the development of a standardized tanker for a production run, such standardized tanker would be wider than Seatrain's so as to permit a shallower and more suitable draft. The graving docks at the Seatrain yard are too narrow to permit Seatrain to build a wider ship—hence the dimensions of their graving docks dictated the maximum dimensions of their ship which are less than optimum.

It is noted that out of a total of some 132 vessels for which Marad has received expression of interest, only three operators—namely Marine Carriers Corp., U.S. Lines and Seatrain—have indicated interest in building tankers in excess of 120,000 DWT.

III. *National Defense Considerations*

The Department of the Navy, by letter dated 22 July 1969, in response to our request for their views on the desirability of large supertankers—such as the Seatrain vessels, stated that "the desirability and capability of tankers drawing over 40 feet and supertankers for direct military support are limited. Further their employment in direct military support during peacetime as 'mother ships' for fleet oilers and floating storage would not be cost effective."

The Navy's evaluation of the CMX 120,000 DWT design also revealed that such a vessel would have little or no value to DOD because it was too deep, too wide, too long and too large.

Vice Admiral Arthur Gralla, the head of the Military Sealift Command, told a Pentagon press conference during October 1970 that he would like to have available some medium sized tankers of 25,000 to 30,000 tons. New

Japanese tankers are 200,000 tons and one now under construction is 467,000 tons. Those tankers are just too huge, Gralla said, to get into many of the areas military vessels might have to enter.

IV. *Shipyard Considerations*

1. There are today ten established major shipyards in the United States engaged in Navy and/or large merchant ship construction (excluding the Seatrain yard). Based on Navy and Marad's evaluation of future U.S. shipyard capability, it is felt that, in view of the new Navy and Marad programs; approximately seven or eight of the ten yards could be gainfully employed in shipbuilding. It is estimated that three yards would be engaged in naval work, three in merchant vessels under the Marad 30 ship per year program and one or two yards engaged in the construction of other vessels such as coastwise tankers, etc. The other two or three yards which will probably not be engaged in shipbuilding will possibly turn to other related construction such as offshore oil rigs, large sub-assemblies, etc. Thus, it appears at this time that the national need for shipbuilding facilities in terms of numbers of shipyards may well be contracting and not expanding.

2. In view of the apparent diminishing need for additional shipyards, there is a serious question as to whether Marad should, through the payment of $40 or more million in CDS, contribute to the start-up and renovation of an unproven shipyard which, at least to date, is committed to building ships for its parent to the exclusion of others, or support going facilities of proven worth. It appears that CDS funds would more effectively benefit the U.S. shipyard capability if the funds were used to help modernize existing yards rather than to foster an additional yard which eventually may not be competitive.

3. The obstacles that Seatrain Shiypard must surmount before it can become a first class competitive shipyard are formidable. Some of the major problems are:

a. Developing a first class experienced and proven management team.

b. Hiring and training efficient production workers and line supervisors.

c. Developing and financing new and highly sophisticated construction systems with unskilled labor at a new shipyard. The new $100 million Litton yard, Ingalls West, is now going through this stage, experiencing delays of a year or more, extensive rework, high management and labor turnover and cost overruns.

d. Maintaining a degree of efficiency and/or a smooth "flow" of work while virtually building a new shipyard and two ships at the same time.

e. Financing possibly large cost overruns on both the shipyard and the ships.

4. Probably the most impelling consideration for Government assistance is the promise that jobs will be created for a large number of the hardcore unemployed and disadvantaged in the area adjacent to the shipyard. The degree to which this will eventually work out can only be conjectured. However, if the yard eventually fails to survive after we spend $40,000,000 in CDS funds, the net result can only be that these people will have some limited and specialized training and temporary employment. These people will not find ready employment in the New York area because the ship repair business is limited in size and their training will not make them readily eligible for the highly unionized building trades. On the other hand, if the $40,000,000 is spent in a shipyard with a high probability of survival, the investment

in training will have a more permanent effect. Since almost all shipyards are near depressed areas the benefiting shipyards will also be training the disadvantaged.

5. Due to the foregoing potential problems that Seatrain will undoubtedly encounter with inexperienced management, labor, yard renovation, etc., we have serious doubts that Seatrain can construct the vessels without serious delays, large cost overruns which Seatrain might not be able to absorb successfully, and the possibility of not completing the vessels. Title XI loan insurance was denied primarily for these same reasons.

6. Seatrain has partially justified the existence of its yard on the fact that no other shipyard in the United States could construct vessels of this size. This is not currently a true statement, since Bethlehem's Sparrows Point yard can build vessels up to 300,000 DWT in its new graving dock; Newport News has a similar capability, although this dock is usually not available for merchant ship construction; and Todds' San Pedro yard is currently building two ways which can readily be joined so as to handle the construction of the size vessels being considered herein.

V. *Foreign Trade Considerations*

On May 3 in Syria, the Trans Arabian Pipeline (Tapline) was knocked out of commission by an errant or deliberately aggressive bulldozer. The Syrian Government has not allowed its repair, preventing 500,000 barrels a day of Saudi Arabian crude from reaching the Mediterranean.

At the other end of the Mediterranean the Libyan Government cut back oil production by 15 per cent, or 500,000 barrels a day.

The loss of almost 1 million barrels a day of oil west of Suez and close to world markets has strained tanker

capacity. Replacement of this oil with production from the Persian Gulf around South Africa takes six to eight times the tanker capacity. As a result, spot charter rates have risen to their highest level since the 1956 Suez crisis and are more than 50 per cent higher than during the 1967 Arab-Israeli war. However, future foreign tanker rates cannot be based on today's inflated rates.

Since the proposed vessels will not be delivered until about 1972-3, we must look at what the tanker rates will be at that time. The most important factor which will offset market rates will be the introduction of a large number of supertankers into service at that time. Based on reports of shipbrokers of vessels under construction or on order there will be about 330 tankers *over 150,000 DWT* in service by 1974 in contrast to the relatively few in service today. In addition, the (1) restoration of Tapline, (2) the possible reopening of the Suez Canal, (3) increased production of Libyan oil and (4) new oil discoveries in the North Sea which are in the "backyard" of the principal European markets all tend to severely reduce tanker requirements with a resultant reduction in rates.

Seatrain's proposed vessels with a draft of 71 feet would be uneconomical carriers in the large Persian Gulf/Japan trade since they could not pass thru the Malacca Straits fully loaded thereby incurring a substantial economic disadvantage in competing with foreign flag tankers of comparable size having a maximum draft of 65 feet.

If Seatrain's vessels are used in the U.S. foreign commerce, there are presently no U.S. discharge ports that could accommodate them at full load draft. There is talk of building a deepwater facility in the entrance of the Delaware Bay, however, this facility has been nothing but talk for many years. There is apparently not sufficient economic justification for its construction with oil import quotas at their present levels.

VI. *Profit Considerations*

Based on Seatrain's own 1970 operating costs (Hase and Haan applications) their vessels would require approximately *$3.49/DWT*/month without CDS subsidy and *$2.15/DWT*/month with *50%* subsidy. The foregoing costs are based on first year interest costs rather than mid-life costs as shown in the applications. Additionally fuel and port costs were deleted as they are normally for charterer's account on long term charters.

Foreign charter fixtures for vessels to be delivered in the early 70's ranged from $1.35/DWT/month to about $1.55/DWT/month for 5 to 10-year charters as follows:

DWT	Delivery	Term	$/DWT/month
225,000	1972	9-10 yrs.	1.55
202,000	9/71	10-yrs.	1.50
214,000	late 72	10 yrs.	1.45
263,000	early 72	5 yrs.	1.35

The foregoing rates were fixed prior to May and the present inflated rates. During October 1970, several vessels in this size range were fixed on 8 year charters at $2.10/DWT/month. Some vessels were fixed for 3 year charters at higher rates; however, they are not indicative of long term rates. Seatrain itself recently chartered 3 vessels in the 128,000 to 151,000 DWT range for $1.80 to $1.90/DWT/month.

Based on Seatrain's minimum required rate of about $2.15/DWT/month (50% subsidy), it appears they would not be able to compete profitably in the foreign trade for long term charters. They could possibly compete on short term spot charters, providing there is a constant "crisis" in the tanker market for the life of the vessels. If less than 50% subsidy is granted, their vessels would be even less competitive since their required rate would be between $2.15 and $3.49/DWT/month depending on amount of subsidy. At mid-life, Seatrain's required rates could decline to $2.65/DWT/month

without subsidy and $1.73/DWT/month with 50% subsidy as a result of a reduction in interest costs providing they could manage to keep the ships operating for the first 10 years at the higher rates.

VII. *Operation of CDS Ships in Domestic Trade*

In accordance with Section 506 of the Act, Marad may consent to the transfer of a vessel built with CDS to other trades (domestic) for periods not exceeding six months in any year with the partial repayment of subsidy. Therefore, the vessels could not operate exclusively in the domestic trade even with repayment of subsidy.

There is a possibility that if Seatrain sold the vessels and repaid subsidy, the ships could operate in the domestic trade under the new owners. Such was the case with the Grace-Sealand containerships, however, said case was an unforeseen necessity and not pre-arranged to circumvent the basic policies of the Act.

Conclusion

It is Marad's contention that it should not expend $40 + million or about 20 to 25% of its limited CDS funds for Seatrain's 230,000 DWT tankers. Briefly, Marad believes that (1) its CDS funds would be more effectively used at this time for ship construction in modern and proven shipyards, (2) there is no national need for an additional shipyard, (3) large tankers for the foreign trade are lower in priority than OBO's, container vessels, and barge ships, (4) there is a serious question as to whether the Seatrain yard can build the vessels without incurring serious delays and large cost overruns, (5) the vessels will encounter operating problems at U.S. ports due to their excessive draft for a ship of this size, (6) the vessels would not be able to compete in the foreign trade during "normal" market periods, and (7) having little or no national defense value, the tankers

appear to fail the statutory requirement that they "be suitable for use by the United States for national defense or military purposes in time of war or national emergency."

We would be pleased to furnish any additional information that you may desire as the foregoing only covered the "high spots."

/s/ Robert J. Blackwell
ROBERT J. BLACKWELL
Deputy Maritime Administrator

ATTACHMENT 2

L13-3:521

Chief, Office of Subsidy Administration
SEATRAIN SHIPBUILDING CORPORATION (Seatrain)—Construction-Differential Subsidy (CDS) for two 230,000 DWT Tankers

Maritime Administrator

Seatrain, by memorandum to the Maritime Administrator dated November 3, 1970, submitted certain information to support their request for the grant of CDS to their wholly owned subsidiaries for the construction of 230,000 DWT tankers (Seatrain tankers). Seatrain attempted to establish (1) the national need for the Seatrain tankers, (2) the series production of the Seatrain tankers, (3) that the Seatrain tankers could be operated in either (a) the foreign trade, or (b) the domestic trade upon repayment of CDS, and (4) the competitiveness of the Seatrain tankers in the foreign trade.

We have briefly reviewed the carriage by sea of oil and dry bulk imports as well as the operation of the Seatrain tankers in the U.S. foreign commerce in order to determine the relative merits of using the limited CDS funds for the Seatrain tankers as opposed to other bulk type ships. Based on said review, we conclude that (1) due to the limited CDS funds available, the interests of the U.S. would better be served by the construction of either smaller tankers, dry bulk carriers or ore/bulk/oil (OBO) carriers for the foreign trade, (2) the Seatrain tankers without operating differential subsidy (ODS) would not be competitive in the foreign trade during a normal market, (3) the Seatrain tankers are not considered to be the optimum design for a standardized tanker, and (4) the introduction of *any* tanker built with CDS into the domestic trade would be inconsistent with the basic policies of the Act and present a serious economic problem

to existing domestic tankers. Said conclusions are based on the following considerations:

I. *Budgetary Considerations*

Based on Seatrain's Exhibit I of the subject memorandum, Seatrain anticipates a minimum subsidy of $21,-150,000 per ship (45% CDS rate) or $42,300,000 for two ships plus escallation [sic].

Marad's fiscal year 1971 budget for CDS is approximately $199,000,000 and for fiscal year 1972 the requested budget level is about $230,000,000. The 1971 budget contemplates commitments for 27 new vessels on a multi-year procurement basis, of which the Government's share of the cost of 19 vessels would be funded in FY 1971 and the remaining 8 vessels funded from CDS appropriations of a subsequent year. This will be the first year of the President's new Maritime Program which calls for the building of 300 new merchant ships over the next 10 years at the rate of 30 ships per year. The commitment for construction of only 27 ships in FY 1971 and funding only 19 of these ships is considerably below the program level, but was mandated by the current Government fiscal restraints. For FY 1972, the projected CDS budget of approximately $230,000,000 will provide for construction of 30 merchant vessels on a multi-year procurement basis but funds for only about 22 vessels.

If two Seatrain tankers were granted CDS in fiscal year 1971, they would consume approximately 20% of the available CDS funds thereby further impairing the Government's goal of building 30 ships per year pursuant to the President's new Maritime Program. Therefore it is imperative that we determine whether there is an impelling national need for these vessels now and if there is such a need, that they are of the best and most suitable design.

II. *Vessel Priority Considerations*

The following is a brief review of our current national dependency on oil imports as compared to our dependency on other dry bulk commodities in order to determine whether the Seatrain tankers are the size and/or type of vessels for the carriage of our imports of liquid and/or dry bulk cargoes.

Oil Imports (Liquid Bulk)

During calendar year 1969, the total U.S. oil requirements amounted to almost 14 million barrels of oil per day (BPD). Domestic sources supplied about 77.3% of such oil requirement and imports about 22.7% or about 3.2 million BPD. Nearly one half (1.4 million BPD) of the imports were crude oil and the other half were refined oils—primarily low grade residual fuel for heating purposes.

Crude oil imports represent about 10.1% of our *total oil requirements.* Approximately 4% of such requirement was supplied by pipeline from Canada, 2.8% from the Mid East/Africa area, 2.7% from South America—primarily Venezuela, and 0.6% from Indonesia.

Refined oil imports represent about 12.6% of our *total oil requirements.* Approximately 72% of such imports were residual fuel oils moving from the Caribbean area to the U.S. East Coast. The balance of such imports consist of gasoline, kerosene, etc. from refineries in Puerto Rico, the Virgin Islands, etc.

The Seatrain tanker, with its 70 foot draft would not be suitable for the carriage of crude oil from the relatively shallow South American ports nor would it be suited for the carriage of the bulk of the residual oils from the relatively shallow Caribbean ports due to draft and shore storage restrictions in the U.S. The only U.S.

foreign trade it could practicably be utilized in is the trade between the U.S. East Coast and the Mid-East or African areas providing an adequate discharge port in Canada or other area can be utilized to lighten the vessel.

Dry Bulk Imports

The United States is heavily dependent on the importation of certain essential raw materials for its very existence. Unlike oil, some of these essential materials are not even produced or found in the U.S., hence, we are totally dependent on importing them from other countries —primarily on foreign flag ships.

The following list shows our degree of dependency on imports of essential raw materials.

Dry Bulk Imports *

Material	% Imported	Material	% Imported
Antimony	95%	Lead	55%
Asbestos	86	Manganese	98
Bauxite	87	Nickel	90
Beryl	96	Potash	44
Chromite	100	Sugar	45
Cobalt	100	Titanium	30
Columbite-Tantalite	100	Tin	100
Copper	37	Tungsten	15
Fibers (Abaca, Sisal, Hemp)	100	Uranium	4
Iron ore	34	Zinc	60

* Source: "U.S. Life Lines" published by U.S. Navy December 1966 as revised by unpublished 1968 data.

While none of the foregoing commodities move in the same quantity as oil, they are nonetheless essential if not vital to our industry and defense. For the most part there are no suitable substitutes or alternatives for these materials. On the other hand, there are substitutes for oil such as atomic power, natural gas, coal, etc.

Vessel Priorities and Standardization

The foregoing brief review of our liquid and dry bulk imports demonstrates our degree of dependency on these materials. In view of our limited CDS funds, it appears imperative that we select vessels for our bulk trade that are sufficiently flexible to operate worldwide and be able to efficiently move those materials on which the U.S. depends heavily in the event foreign flag ships are not available for one reason or another. As stated previously it is *not* the purpose of this memorandum to recommend a particular type of vessel or vessels for the bulk trades but rather to determine whether or not the Seatrain tanker is the type or size vessel which Marad feels it should expend its CDS funds to promote. It is the opinion of this Office that the Seatrain tanker is *not* the vessel which Marad should promote for the following reasons:

1. For reasons heretofore stated—primarily draft and shore storage capacity—the Seatrain tanker is primarily limited to the trade between the U.S. East Coast and Mid East or African areas with respect to the U.S./foreign commerce. Although this trade is relatively large in volume (about 400,000 BPD) it only represents about 2.8% of our total oil requirements or about 12.4% of our total oil imports. In contrast, a smaller tanker that could utilize the relatively shallow ports of Venezuela and the Caribbean area as well as the Mid East and African ports could move up to 18.7% of our total oil requirements or about 82% of all our oil imports (the remaining 18% of imports are moved from Canada by pipeline). Normally such a tanker would not be used in the long haul Mid-East trade, however, it can be used *if necessary* and possibly make a profit in a "crisis" market such as today.

2. At this time, it appears that the U.S. would prefer to obtain crude oil from sources other than the Mid-East to satisfy its ever-increasing demand for oil. In March 1970, a White House task force recommended that the oil import policy be changed to make the U.S. gradually more dependent on supplies imported from Mid-East. Since then, production and transportation of Mid-East oil has been so disrupted that petroleum from that part of the world is no longer cheap nor dependable. As a result, the task-force report has been shelved and serious attention has been given to (1) working out a long range continental energy policy with Canada which has vast untapped oil and natural gas reserves, (2) the greater utilization of offshore oil resources in the Gulf of Mexico as evidenced by the Department of Interior's lifting of the ban on such leases effective December 15, 1970, and (3) the further development of reserves in the "lower 48 states" based on the National Petroleum Counsel's report of July 1970 that there are still vast oil and gas reserves in the "lower 48." In view of the apparent desire of the United States to lessen its dependency on Mid-East oil and developing sources closer to "home," there appears to be a diminishing rather than an increasing need for large tankers—such as the Seatrain tanker in the U.S. foreign commerce.

3. During 1969, it was announced that Marad would develop a series of standard ship designs suitable for multi-ship, multi-year production. Subsequently, the Competitive Merchant Ship Program was inaugurated and contracts were let to Newport News Shipbuilding & Dry Dock Co. and Bath Iron Works to develop a series of standard ships of all types—to be known as the CMX designs. Both companies were assisted by various research institutions and a 12 man advisory panel of senior officers in various steamship companies sponsored by the American Institute of Merchant Shipping (AIMS). In

depth studies were conducted which included trade forecasts through 1982, port information, seasonal variation, etc. As a result of these studies and in depth interviews with steamship operators, a number of vessel types and sizes were recommended.

With respect to bulk type ships, it is noted that the largest tankers considered were the 125,000 DWT Voyager class with a draft of 48′ 6″ and the 75,000 DWT Machias class with a draft of 47′ 0″. Both of these vessels have an optional mid-body to make them OBO's. The OBO's considered ranged between 60,000 and 73,000 DWT.

The smaller Machias Class tanker and possibly the larger Voyager class vessel could serve almost all of our offshore oil trades. The OBO's could also serve the same oil trades and have the added flexibility of serving in the vital dry bulk trades as well. They would also have the ability to (1) operate in a three legged trade—i.e., oil on one leg, dry bulk on the second and ballast on the third and (2) operate in the most favorable dry or liquid trade during the peak season thereby further enhancing its revenue potential. On the other hand, the Seatrain tanker—due to its large size, draft and design is virtually "married" to the small (in terms of percent of total trade) and possibly diminishing Mid-East/U.S. oil trade.

In summary, it does *not* appear that the Seatrain tanker is the ideal design to promote as a standardized ship for multi-ship, multi-year production as envisioned by the President's new Maritime Program.

III. *Competitiveness of the Seatrain Tankers in the Foreign Trade*

Seatrain has submitted a half dozen voyage proformas showing the profitability of the Seatrain tankers in the

U.S. foreign trade utilizing, for the most part, existing oil terminal facilities. The crude oil voyages from the Mid-East contemplate the use of St. Johns, N.B. or St. Croix, V.I. as lightening ports prior to proceeding to the Delaware Bay anchorage with a 52 foot draft where further lightening would be accomplished before proceeding up river at a 39 foot draft. To the best of our knowledge, the Seatrain tankers could not utilize either St. Johns or St. Croix at its full 70 foot draft as the maximum depth at St. Johns is about 61 feet (including a 21 foot tide) and about 60 feet at the Hess Oil Terminal in St. Croix. The vessels could utilize the Delaware Bay anchorage with a 52 foot draft—however about 48,000 tons would have to be lightened in order to proceed up river with a 39 foot draft. Seatrain also showed voyages utilizing discharge ports at (1) Northville, Long Island which has a maximum depth of 70 feet (including a 3 foot tide) at an exposed sea berth, however, due to sea conditions, the Seatrain tankers could not use this berth at its full 70 foot draft, (2) Seattle with full draft, however, the maximum depth available will only be 60 feet at the Atlantic Richfield facility, and (3) San Francisco with a 51 foot draft after discharging part of its cargo at Yokahoma, however, the vessels would have to be lightened to about 39 feet in order to proceed to the refineries. Hence, all the proformas do in fact contemplate either improvements at the various oil terminals, the carriage of less than a full load of cargo, or considerable lightening of the vessels.

We have reviewed Seatrain's proformas, and find that their estimates are not grossly in error. We and Ship Operations doubt that they will be able to use a 28 man crew; therefore, we recalculated their expenses utilizing a 35 man crew and first year interest expense rather than mid life. Utilizing our revised expenses, we find that the Seatrain tankers could operate profitably in

today's inflated foreign market. However, we do not feel they will operate in the U.S. foreign trade as proposed primarily for two reasons:

(1) The lightening and/or discharge ports are not adequate as mentioned above, and

(2) no tankers in excess of about 100,000 DWT served the U.S. foreign oil trade even though there were—on December 31, 1969—approximately 60 foreign tankers in excess of 200,000 DWT or 125 in excess of 120,000 DWT—most of which had considerably less draft that [sic] the Seatrain tankers. There are several reasons why larger tankers are not used in the U.S. foreign trade: (1) due to draft restriction at U.S. ports, a large tanker must incur the additional cost of utilizing a lightening port outside of the U.S.; (2) the cost of lightening of about 50,000 or more tons at Delaware Bay is expensive; and (3) the rates for a 100,000 DWT tanker are fairly comparable to that of a 200,000 DWT tanker, hence, the added cost for an additional discharge port and excessive lightening costs at Delaware Bay makes the *final* delivered cost to the charterer *higher* on the larger ship than on the smaller ship. For these reasons we feel the Seatrain proformas are unrealistic. It is our opinion that Seatrain will operate these vessels in the foreign to foreign trade while the rates are inflated and then attempt to operate them in the proposed domestic Alaskan trade when and if facilities are available.

With respect to the *long term* operation of the Seatrain tankers in the foreign trade, we do not believe it will be competitive. Based on Seatrain's construction cost data, a 45% CDS rate, a 35 man crew as opposed to Seatrain's 28 man crew, and first year interest expense at 8¾% plus ¾% mortgage insurance premium, Seatrain could charter its vessels at $2.48/DWT/month to break even. Present rates for *short term* 2 to 3 year

charters with delivery in 1972-1973 approximate $3.50/DWT/month, hence, they could anticipate a fair profit to about 1975 or 1976. Based on a review of *long term* charters, negotiated since January 1, 1969, rates for a 200,000 DWT tanker ranged from a $1.45 to $1.50/ton for a 10 year charter of $1.75 for an 8 year charter. Recent rates for 5 year charters ranged from $2.10 to $2.37/DWT/month. It appears that charterers are willing to pay relatively high rates until about 1975 in order to assure sufficient tonnage until the large number of giant ships now on order are delivered. According to the latest Sun Oil Report (December 31, 1969) there are approximately 200 ships on order in excess of 120,000 DWT or a total of 570 ships with an average DWT of 104,100 tons. Assuming there is not another "crisis" in the tanker market in 1975, it appears that the world tanker market will be overtonnaged and rates will be drastically reduced. Based on Seatrain's required rate and rates that foreign ships can accept, the Seatrain tankers could not compete against the foreign tankers in a *normal* market.

IV. *Domestic Operation of the Seatrain Tankers Built with CDS*

Seatrain, in accordance with its November 3, 1970 memorandum, intends to divert the Seatrain tankers to the domestic trade with Marad's consent up to six months in any one calendar year with the partial repayment of CDS or permanently upon the repayment of the unamortized portion of the CDS.

We are opposed to the return of any vessel built with CDS to the domestic trade that is capable of the carriage of liquid bulk cargoes primarily for two reasons—namely (1) it is inconsistent with the basic policies of the Act, and (2) it presents unfair competition to existing and proposed domestic vessels built and operated without government subsidies.

The legislative history of Section 506 shows that the provision for the transfer of a vessel built with CDS to the domestic trade for a period not exceeding 6 months was intended for *emergency* or *temporary* purposes. As originally enacted, Section 506 provided in part as follows:

"If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months."

While the specific references to a transfer for emergency and temporary purposes were not retained in a 1938 amendment, Congress intended no essential change. In H.R. Report No. 2168, the House Committee on Merchant Marine and Fisheries stated the following:

"No fundamental change in the original purpose of the section has been effected."

Both Chairman Kennedy of the Maritime Commission and the Senate Committee on Commerce in S. Report No. 1618 said as follows regarding the amendment to section 506:

"It is believed that the section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic."

Since the provision for transfer to services other than those enumerated in the first sentence of section 506 is intended for emergency or temporary purposes, it would

appear to be inconsistent with this intention to base the necessary findings for a CDS award on such transfers which might involve a total period equal to one-half the economic life of each ship. Use of the ships under such conditions would *not* be transfers for temporary or emergency purposes.

Seatrain's proposal also suggests that the tankers could be operated without restriction in the domestic trades upon repayment of the full unamortized portion of the CDS. Neither section 506 nor any other provision of the Act relating to the CDS provides for releasing a CDS built ship from the domestic trade restrictions imposed by section 506 upon repayment of unamortized CDS. However, in a decision letter dated September 30, 1964 (B-155036) the Comptroller General concurred in the opinion of the Department of Commerce that the Maritime Subsidy Board had the authority to amend construction-differential subsidy contracts to free the ships built with the aid of subsidy granted under such contracts from the restrictive provisions incorporated therein pursuant to section 506. Apparently Seatrain, in proposing the possibility of entirely lifting the Section 506 restriction, is relying upon the Department's opinion and concurrence by the Comptroller General.

While it is acknowledged that this opinion and concurrence therein did permit the lifting of the section 506 restriction from existing ships in a *particular instance*, it would appear inconsistent with the basic purpose of CDS to build ships for the U.S. foreign trade and to consider an application for CDS based on initial acceptance of the premise that at any time after the building of the ships, Seatrain might obtain a release from the section 506 restrictions by repayment of unamortized CDS.*

* The foregoing legislative history and conclusions were confirmed by legal opinion dated December 10, 1970 (attached).

Seatrain's proposal—or any proposal to operate a liquid bulk carrier in the domestic service that was built with CDS poses unfair competition to the domestic carrier that operates without any government subsidies even though there is a repayment of CDS for the time the vessels operate in the domestic service primarily for two reasons:

(1) The Vessel amortization costs (principal and interest) per voyage for a vessel built with CDS is less than that for a vessel built without CDS even though a proportionate share of the CDS is repaid. This is true for the simple reason that the unsubsidized owner must pay interest on the full cost of the vessel whereas the subsidized owner is only paying interest on approximately one-half of the cost of the vessel. In other words, CDS represents an interest free loan to the subsidized operator while operating in the domestic trade. Since interest represent a substantial cost to the operator, any reductions in such costs are a *real* advantage; and

(2) If a vessel is built with CDS and permitted to operate in the domestic trade more or less at will, it has the opportunity to operate in the domestic trade during the "peak" season and in the foreign trade during the "off" domestic season. The unsubsidized vessel normally does not have this opportunity therefore it must make its profit during the "peak" domestic season. Obviously if the CDS vessel is allowed to "skim the trade" during the peak domestic season in conjunction with its lower operating costs (item (1)), the CDS vessel or a group of CDS vessels so operated could eventually break the solely domestic operator. Additionally there would be little or no incentive for an owner to build a vessel solely for the domestic trade if he has to encounter unfair competi-

tion from subsidized operators operating in the domestic trade for the profitable portion of the year.

M. E. PARR
Chief, Office of Subsidy Administration

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ATTACHMENT 3

U.S. DEPARTMENT OF COMMERCE

ABSTRACT OF SECRETARIAL CORRESPONDENCE

TO: [X] The Secretary [ ] The Under Secretary

FROM: General Counsel

SUBJECT: Alternative Sources of Department of Commerce Funding for Seatrain Shipbuilding

The attached memorandum sets forth the joint views of the Maritime Administration (MarAd) and the Economic Development Administration (EDA) on possible sources of departmental funding for the Seatrain Shipbuilding Corporation of New York, which is currently in default on its loan obligations because of the collapse of the world tanker market.

As the memorandum indicates in connection with the second alternative, dealing with an EDA loan guarantee, it is the joint view of the two agencies that MarAd has no satisfactory alternative for providing the necessary assistance and that EDA participation would be required if Federal assistance is to be provided. An addendum to the principal memorandum sets forth the problems with respect to any form of further assistance by MarAd.

Attachment

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SURNAME AND ORGANIZATION (*Typed*)	PREPARED BY KEBakke General Counsel

ATTACHMENT I

Consideration of Completing Two Ships under Construction at Seatrain Shipyard under Maritime Administration Programs and Authorities

Current Status

Hull #102 was contracted for on June 30, 1972 at a contract price of $62.9 million. Based on this contract price the maximum authorized construction-differential subsidy (CDS) of $27.0 million was awarded and the maximum authorized Title XI guaranteed construction loan (Title XI) of $30.2 million was committed. At the present time approximately $22.1 million of CDS and $20.0 million of Title XI have actually been invested in the vessel. It is estimated that in addition to the balances of CDS and Title XI funds committed but not yet expended a minimum of $14.3 million will be required to complete the construction of Hull #102. The total construction cost of the vessel, including owner's equity, is projected to be at least $91.0 million.

Hull #103 was contracted for on June 29, 1973 at a contract price of $70.6 million. Based on this contract price the maximum authorized CDS of $28.8 million was awarded and the maximum authorized Title XI of $34.5 million was committed. Currently approximately $9.4 million of CDS and $3.5 million of Title XI have actually been expended. It is estimated that a minimum of $25.7 million of new funds will be required to complete the construction of Hull #103 resulting in a total construction cost, including owner's equity, of at least $103.3 million.

MarAd's Programs and Authorities

CDS—The amount of CDS is determined on the differential between the fair and reasonable domestic contract price and the estimated fair and reasonable foreign price of a similar vessel. Since these prices have not changed, there is no statutory authority to increase the amount of CDS applicable to these vessels.

Title XI—The maximum Title XI authorized by statute is 75% of the owner's "fair and reasonable actual cost" for a vessel constructed with the aid of CDS or 87½% of the owner's "fair and reasonable actual cost" of a vessel constructed without the aid of CDS. In all cases a finding must be made that the project is economically sound and can adequately support the amount of guaranteed borrowings. Consideration of additional Title XI guaranteed loans for these vessels is discussed below.

Section 207 of the Merchant Marine Act, 1936, as amended—This section of the Act authorizes MarAd to make such disbursements as may, in its discretion, be necessary to protect, preserve or improve the collateral held by MarAd to secure indebtedness in the same manner that a private corporation may contract within the scope of authority of its charter. This authority has been used in the past only with the specific concurrence of the General Accounting Office. Consideration of the use of this authority is discussed below.

Consideration of Possible Actions by MarAd

1. *Commitment of additional Title XI guaranteed loans to complete the two vessels for employment in the foreign trade*

As noted above, MarAd's present Title XI commitment for the two vessels is $64.7 million and a minimum of $40.0 million of additional funds is required to complete the vessels. If these additional funds were provided by Title XI guarantees, the total Title XI guarantee exposure would be $104.7 or an average of $52.35 million per vessel. Currently, due to the depressed world tanker

market, vessels of this size have an estimated sales value of approximately $30 million. Prospects for any improvement in this market over at least the next three to five years are not favorable due to a projected over-tonnaged condition of tankers in the world trade. Clearly an economic soundness finding cannot be made to support an additional Title XI commitment under present circumstances. The institution of an oil cargo preference program for U.S.-flag tankers would increase the value of these vessels and might make them more economically feasible in the foreign trade. The extent of the increased value would depend in large measure on the nature of the oil cargo preference program and the value attributed to such a program by potential purchasers or long-term charterers of these ships.

2. *Commitment of additional Title XI guaranteed loans to repay and replace CDS and to complete the two vessels for employment in the Alaskan Oil Trade*

It is possible with the consent of MarAd and the concurrence of the GAO for the owner to repay the CDS and thereby make these vessels eligible for employment in the domestic trade. MarAd has determined by comparisons with vessels currently being contracted for use in the Alaskan oil trade that these vessels would have a value of $84 million and possibly higher. The amount of additional Title XI guaranteed loans to complete the vessels for the domestic trade would be at least $100.3 million, consisting of $55.8 million to repay and replace CDS, $40.0 million of additional construction cost and $4.5 million of additional interest during construction. This would increase the total Title XI for the two vessels to $165.0 million. Although the sales value of $84 million per ship would appear to support this approach, it has several shortcomings. First, it would essentially eliminate any potential alternative employment of the vessels in the foreign trade because of the extremely high

capital cost without CDS. Secondly, it would create a problem of making an economic soundness finding since the Title XI guaranteed loans would be almost 100% of the projected sales value. Thirdly, it would be necessary to establish a "fair and reasonable actual cost" of $188.6 million to support an 87½% Title XI guarantee of $165.0 million. Although the total capitalizable cost would exceed this amount, it is questionable that a figure as high as $188.6 million could be deemed to be "fair and reasonable."

3. *Application of Section 207 to advance funds to complete the two vessels for employment in the foreign trade*

The amount of funds that would be needed to be disbursed under the authority of Section 207 to complete the two ships for use in the foreign trade would be a minimum of $40.0 million, the same as under item 1 above. The total MarAd exposure, including the existing Title XI commitment, would be $104.7 million. Assuming a sales value of $30.0 million per ship, the potential loss to the Government would be $44.7 million. At the present time MarAd's exposure on its Title XI guarantee is $23.5 million, representing the Title XI guaranteed loans actually invested in the two vessels. It is estimated that the scrap value of the two hulls plus other collateral held by MarAd would produce proceeds of approximately $10.5 million. The net loss from an immediate default, therefore, would be approximately $13.0 million. Based on these comparative positions, it is not possible to conclude that advances under authority of Section 207 would "protect, preserve or improve" MarAd's collateral position.

4. *Application of Section 207 to advance funds to repay and replace CDS and to complete the two vessels for employment in the Alaskan oil trade*

Similar to the situation of item 2 above, the amount of disbursements under authority of Section 207 to effect this approach would be $100.3 million. Added to the existing Title XI commitment, MarAd's exposure would be increased to $165.0 million. If the completed vessels are deemed to have a value of $84 million per vessel, the collateral position of MarAd would in fact be improved in comparison with the approximate $13.0 million loss resulting from immediate default. A major bar to this action, however, is that the amount of funds needed to be disbursed pursuant to Section 207 exceeds the balance of the Ship Financing Fund which is the only source of funds available to MarAd for this purpose. In addition, this course of action has the same deficiency as item 2 to the extent that the decision to go forward to complete the vessels for use in the domestic trade by repaying and replacing CDS essentially eliminates the potential alternative employment of the ships in the foreign trade.

Conclusion

The options of completing the vessels for employment in the foreign trade are precluded under MarAd's statutory authorities considering present and foreseeable future conditions of the world tanker market, particularly in the absence of an oil cargo preference program for U.S.-flag tankers. Completing the vessels for use in the domestic trade and repaying and replacing CDS might be legally possible, but it is not the most viable solution. The repayment of CDS now and the need to commit other Government funds to replace CDS compounds the funding problem. It also effectively removes a potential alternative source of employment in the foreign trade which would be an important consideration if a cargo preference program is instituted in the future. The use of the EDA program to provide funds needed to complete the vessels over and above MarAd's current commitments of CDS and Title XI would reduce the amount of new Government funds now required, would produce more unguaranteed private financing, would reduce the cost of interest during construction, and would preserve the alternative employment of the vessels when completed.

ATTACHMENT 4

LEGAL OPINION

430 December 17, 1952

210 L25-24/L10-5:212

Application of Section 506 of the Merchant Marine Act, 1936, as Amended, to Essential Vessels on which Adjustments and Arrangements were Granted Pursuant to the Provisions of the Relief Act (Public Resolution No. 89—76th Congress)

This will refer to your memorandum of July 30, 1952, on the above subject, inquiring in connection with the application of the General Counsel's opinion of September 21, 1948, "as to whether, pursuant to Section 506, there is required to be taken into account periods during which the vessels involved were operated pursuant to the provisions of the so-called 'Relief Act' and the corresponding domestic revenue carried by the Owners during such periods." Specifically, your inquiry concerns the operation of the SS AMERICA under the Relief Act in the West Indies Cruise Service and for two intercoastal voyages betwen New York and San Francisco.

At the time United States Lines agreed to purchase the AMERICA under Construction-Differential Subsidy Agreement No. MCc-924, dated October 21, 1937, Section 506 provided as follows:

> "It shall be unlawful to operate any vessel for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or lands or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyage completed during the preceding year."

However, at the time of delivery of the vessel on July 2, 1940, Section 506 had been amended by the Act of June 23, 1938, to read as follows:

> "Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one-twentieth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for

> the operation of such vessel for such temporary period".

The provisions of the Construction-Differential Subsidy Agreement pertaining to the operation of the vessel followed the original Section and have apparently continued unchanged.

Because of the necessity for the suspension of operation of vessels in certain foreign trades as a result of the Neutrality Act of 1939, the Relief Act was enacted on June 29, 1940, to make emergency provision for the maintenance of "essential vessels" affected by the Neutrality Act and for the adjustment of obligations with respect to such vessels. Under this Act, the Maritime Commission was authorized, subject to certain determinations being made, to make adjustments and arrangements with applicants for relief in accordance with Subsection (c) of such Act, reading in part as follows:

> "(c) Such adjustments and arrangements shall include suspension of the requirement to operate such vessel in foreign trade under the applicable operating-differential or construction-differential subsidy contract or mortgage or other agreement, and of the right to operating-differential subsidy in respect of such vessel, and may include any one or more of the following provisions, in whole or in part, as, and to the extent that, the Commission may deem to be necessary or appropriate to carry out the purposes of the Merchant Marine Act, 1936, or the purposes and provisions of this joint resolution:
>
> "(1) Lay-up of the vessel by the owner or, at the option of the Commission, in the custody of the Commission, with payment or reimbursement by the Commission of necessary and proper expenses thereof (including reasonable overhead and insurance), or

in lieu of such payment or reimbursement, a fixed periodic allowance therefor.

* * * *

"(5) Provisions for such temporary or emergency employment of the vessel in lieu of lay-up as may be practicable, with such arrangements for management of the vessel, payment of expenses, and application of the proceeds of such employment, as the Commission may approve, the period or periods of such operation being included as part of the period or periods of lay-up".

With regard to the AMERICA, I am advised by your office that there was no formal agreement with United States Lines covering the operation of the vessel under the Relief Act. This is confirmed by our review of the files which indicates that such operation was conducted pursuant to (a) the application of United States Lines of June 29, 1940, as amended September 19, and 27, 1940, (b) the Commission's actions on such applications on July 9, 1940 (authorizing operation in the West Indies Cruise Service), November 26, 1940 (authorizing intercoastal operation), June 27, 1941 (authorizing the charter of the vessel by the Commission for subcharter to the War Department), October 16, 1941 (final review and approval of relief application), December 29, 1942 (termination of arrangements under Relief Act), and on other dates (authorizing the deferment of payments of mortgage principal and interest), and (c) the Commission's notices of those actions to United States Lines. However, I have been unable to find any specific reference in the application or in the Commission actions or notices regarding the repayment of construction-differential subsidy pursuant to Section 506 of the 1936 Act during the period of authorized operation in the domestic trade. Likewise, there is no such specific reference in the Relief Act. The answer to your question, therefore,

is dependent upon the interpretation and application of the above-quoted provisions of the Relief Act.

As noted above, the provisions of Section 506 were different at the time the contract to purchase the AMERICA was signed than at the time the vessel was delivered and, of course, operated under the Relief Act. The provisions of the purchase contract followed the earlier version of Section 506. However, it does not appear necessary for the purpose of your question to decide which of these provisions would normally be applicable to the operation in question. It suffices to note that under either provision the requirement to repay construction-differential subsidy for operation in domestic trade is imposed as an incident to the requirement to operate the vessel in foreign trade.[1] Therefore, since the requirement to operate the vessel in foreign trade is mandatorily suspended by the above-quoted language of subsection (c) of the Relief Act, the requirement for the repayment of subsidy for operation in domestic trade must likewise be deemed suspended by force of the Relief Act as to any temporary or emergency employment of the vessel in domestic trade pursuant to the provisions of the Relief Act. In other words, the suspension of the requirement for operation of the vessel in foreign trade must of necessity include the suspension of the consequences provided for operation of the vessel in other than foreign trade.[2] Moreover, from a general purpose standpoint,

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[1] See in this connection the General Counsel's memorandum of September 21, 1946, wherein the purpose of Section 506, both before and after amendment, is discussed at length.

[2] While the technical argument might be advanced that the suspension of the contractual requirement respecting the operation of the vessel (i.e. the provisions of the Construction-Differential Subsidy Amendment) would not constitute a suspension of a statutory requirement not in existence at the time of such contract (i.e. the provisions of Section 506 in its amended form)—assuming the possibility of the application of such statutory requirement

since it was the plan of the Relief Act to make emergency provision for the maintenance of essential vessels and for the adjustment of obligations with respect to such vessels, including the temporary employment of the vessels in lieu of their lay-up, obviously as an expense-saving arrangement to the Government, it seems quite clear that there could have been no intention to continue an obligation of the contractor which logically would have called for equivalent relief by the Government.

I have examined the legislative history of the Relief Act and find that the reports of the House and Senate Committees, House Report No. 2486 and Senate Report No. 1714, both to accompanying S. J. Res. 260, contain no specific statements on the question. However, in the hearings on S. J. Res. 260 conducted by the House Committee, entitled "Maintenance of Vessels Affected by the Neutrality Act," dated June 1, 1940, the point was made that vessels receiving construction-differential subsidy could be operated in the intercoastal and coastwise trades. This was brought out in a letter to Congressman Blasi from the Luckenbach Steamship Co., Inc., dated May 31,

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standing alone—the better view would seem to be that the legislation suspending the contractual requirement stemming from the earlier statutory requirement (i.e. the provisions of Section 506 in its original form) would be sufficient to suspend not only the earlier but also the later statutory requirement, both of which relate to the same subject, namely, the owner's obligation to operate subsidized vessels in foreign trade. In other words, the suspension of the requirement of the Construction-Differential Subsidy Agreement to operate the vessel in foreign trade would be sufficient to include the suspension of the statutory requirement of Section 506 both in its original and amended form. Moreover, it may fairly be argued that since the Construction-Differential Subsidy Agreement contained the overall, general provision that "the vessel shall be operated as prescribed by the Act", the suspension of the contractual requirement automatically suspended the statutory requirement of Section 506 both in its original and amended form.

1940, quoted in the Hearings on page 9, which states in parts as follows:

> "The purpose of the above-mentioned act is to make emergency provisions to enable maintenance of essential vessels affected by the Neutrality Act of 1939 and the adjustment of obligations of such vessels.
>
> Under its provisions vessel owners, the Commission, or charterers could operate in the intercoastal and coastwise trades vessels assigned to foreign routes under the Merchant Marine Act of 1936, which it is impossible to operate under the Neutrality Act of 1939.
>
> It would also be possible for such vessels when operated in the intercoastal and coastwise trades to receive construction and operating differentials. This is discriminatory class legislation and it also breaches the intent and text of certain sections of the intercoastal and coastwise laws and the Merchant Marine Act of 1936."

The reaction of the Committee seems to have been to recognize the possibility of such operation by subsidized vessels but to leave to the Maritime Commission in the administration of the Relief Act the matter of making provision for emergency operation of such vessels with due regard to existing services. This is indicated by the statements of Committee members immediately following the inclusion of the Luckenbach letter in the Hearings, as follows:

> "MR. OLIVER: Of course his objection would apply to the general situation—barring the situation where there is now a subsidy—where domestic shipping does not have a subsidy. But if those ships are not to be transferred over to the domestic trade, or in routes adequately served now, it does not seem

to me there is anything to be particularly disturbed about.

MR. BOYKIN: That is right."

Further in this connection, House Report No. 2486 states as follows:

> "Some concern was expressed by representatives of the steamship industry during the committee hearings as to danger of legislation which may be broad enough to permit the operation of dislocated vessels under Government auspices in areas already served by American vessels. Your Committee feels that broad discretion necessarily must be vested in the Commission in order to protect the national interest in the maintenance of vessels essential to the American merchant marine, and that this discretion will be administered by the Commission with due regard to existing services."

The same possibility, i.e. of vessels receiving construction-differential subsidy operating in domestic trade, appears to have been recognized by the Maritime Commission on November 26, 1940 when it approved the recommendation of the Chief Examiner dated November 15, 1940, reading in part as follows:

> "The hearing was held October 10, 1940 with recesses to October 17, and October 22. At the first session a letter was submitted by a representative of American-Hawaiian Steamship Company reiterating objections previously made at other hearings to the operation of Government aided vessels in the intercoastal trade in competition with unsubsidized private operators. In this letter it was contended that the cost of any relief to which the applicants might be entitled on account of the burdens of the Neutrality Act should be borne by the public generally and should not be imposed upon a few intercoastal lines by subjecting them to Government subsidized competition. These objections were endorsed by a representative of Luckenbach Steamship Company who testified at the hearing."

Needless to say, these objections would have been lacking in value had it been recognized that the usual requirement to repay subsidy pursuant to Section 506 remained effective with regard to operations in domestic trade under the Relief Act.

Thus it appears that the interpretation and application of the Relief Act hereinabove given is not inconsistent either with the indicated intent of the Congress in the enactment of such Act or of the Maritime Commission in its administration.

Accordingly, it is my opinion that the answer to the question raised in your memorandum is that for the purpose of applying Section 506 neither the period of operation of the AMERICA under the Relief Act nor the domestic revenues earned during such period should be taken into account.

/s/ Elmer E. Metz
ELMER E. METZ
Assistant General Counsel

/s/ J. R. Tankard
J. R. TANKARD:rg

cc: 210-2
212 JKH
212 JRT
431-2
610-2
211
762

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

AMENDMENT OF COMPLAINT

Plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation hereby amend Paragraph 35 of their complaint, as a matter of course pursuant to Rule 15(a), Federal Rules of Civil Procedure, to state as follows:

35. The actions taken by MarAd/MSB approving the Seatrain/Polk proposal are wholly unauthorized and beyond its powers in that the agency:

(a) lacks authority to release the vessel owner from the statutory restrictions of section 506 barring operation of a vessel built with CDS in domestic trades;

(b) lacks authority to accept the repayment of construction differential subsidy in full so as to "cleanse" the vessel of statutory restrictions governing vessels built with the subsidy;

(c) lacks authority to make a loan either for construction of a vessel or for repayment of construction differential subsidy. The actions are also unlawful in that they were taken in violation of the agency's regulations, 46 CFR 250, in violation of the Administrative Procedure Act, 5 USC § 552, contrary to standards of due process, and were arbitrary, capricious and an abuse of discretion, under 5 U.S.C. § 706.

The amendment consists of inserting the phrases "in violation of the Administrative Procedure Act, 5 USC

§ 552" and "were arbitrary, capricious and an abuse of discretion under 5 USC § 706" in subparagraph (c) of Paragraph 35.

Respectfully submitted,

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Attorneys for
ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION

October 20, 1977

[Certificate of Service Omitted in Printing]

Civil Action No. 77-1645

Civil Action No. 77-1647

[Caption Omitted in Printing]

STIPULATION OF UNDISPUTED FACTS

The parties having conferred as to the facts in this case do hereby stipulate and agree as follows:

1. In June, 1972, the Maritime Subsidy Board (MSB) entered into a CDS contract (MA/MSB-164) with Seatrain Shipbuilding Corporation (hereafter Shipbuilding) relating to the construction of the TT STUYVESANT, a 225,000 dwt very large crude carrier. In June, 1972, the agency entered into a CDS contract (MA/MSB-165) with Polk Tanker Corporation (hereafter Polk) relating to purchase of the TT STUYVESANT. The contracts are attached hereto as Exhibits A and B.

2. Pursuant to these contracts, MSB paid $27,200,000 of CDS for the TT STUYVESANT.

3. Additionally, $28,845,000 in construction loans were guaranteed by the Secretary under Title XI of the Merchant Marine Act, 1936 prior to the actions contested in this case.

4. On July 8, 1977, Polk filed an application with the Assistant Secretary of Commerce for Maritime Affairs (hereafter MarAd/MSB). That application is attached hereto as Exhibit C.

5. Notice of the application was published in the Federal Register on July 19, 1977. MarAd assigned the application Docket No. S-565; numerous public comments were received opposing the application including comments from Shell and Alaska Bulk Carriers, Inc.

6. On August 25, 1977, Polk filed an application with MarAd/MSB. No notice of that application was published in the Federal Register. A copy of that application is attached hereto as Exhibit D.

7. On August 26, 1977, Polk submitted a letter to MarAd/MSB withdrawing the July 8th application. No notice of that letter was published in the Federal Register. A copy of that letter is attached as Exhibit E.

8. MarAd/MSB took a series of actions with respect to Polk's August 25, 1977, application. These actions are set forth in two letters, each dated August 31, 1977, from MarAd/MSB to Polk and Queensway Tanker, Inc., which are attached hereto as Exhibits F and G.

9. On September 30, 1977, MarAd/MSB carried out the action set forth in the two letters of August 31st.

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Attorney for Shell Oil Company

AMY L. KLEIN
Attorney for Alaska Bulk Carriers, Inc., and Trinidad Corp.

JOSEPH SHER
Attorney for the Federal Defendants

/s/ William E. McDaniels
WILLIAM E. MCDANIELS
Attorney for Seatrain Shipbuilding Corp., and Polk Tanker Corp.

October 20, 1977

EXHIBIT A

MARITIME SUBSIDY BOARD
U.S. DEPARTMENT OF COMMERCE

CONSTRUCTION-DIFFERENTIAL SUBSIDY
CONTRACT MA/MSB-164

BETWEEN THE MARITIME SUBSIDY BOARD
AND SEATRAIN SHIPBUILDING CORP.

PREAMBLE

ARTICLE 1. GENERAL STATEMENT

ARTICLE 2. CONTRACT PRICE; NATIONAL DEFENSE FEATURES

ARTICLE 3. CONSTRUCTION-DIFFERENTIAL SUBSIDY

ARTICLE 4. PAYMENT OF CONTRACT PRICE AND COST OF NATIONAL DEFENSE FEATURES

ARTICLE 5. DOMESTIC PREFERENCE

ARTICLE 6. FUNCTIONS AND RIGHTS OF THE BOARD

ARTICLE 7. DOCUMENTS AND DATA TO BE FURNISHED TO THE BOARD

ARTICLE 8. CHANGES

ARTICLE 9. RIGHTS OF PURCHASER AND BOARD WITH RESPECT TO ENGINEERING AND DESIGN DATA

ARTICLE 10. INJURY TO EMPLOYEES AND OTHERS; PROPERTY DAMAGE OR LOSS

ARTICLE 11. TOTAL LOSS OF A VESSEL

ARTICLE 12. INSURANCE ON THE VESSELS AND MATERIALS

ARTICLE 13. LIMITATION OF GOVERNMENT MONETARY OBLIGATION; LIABILITY FOR ACTS OF PURCHASER

ARTICLE 14. PATENT INFRINGEMENT

ARTICLE 15. OPTIONAL TERMINATION BY THE BOARD

ARTICLE 16. DEFAULT OF PURCHASER IN CONTRACT PAYMENTS

ARTICLE 17. DEFAULT OF CONTRACTOR

ARTICLE 18. ACTION BY THE PURCHASER AND BOARD UPON DEFAULT

ARTICLE 19. FEES

ARTICLE 20. ASSIGNMENT OF CLAIMS

ARTICLE 21. OFFICIALS NOT TO BENEFIT NOR BE EMPLOYED

ARTICLE 22. LABOR PROVISIONS

ARTICLE 23. WORK HOURS ACT OF 1962—OVERTIME COMPENSATION

ARTICLE 24. EQUAL EMPLOYMENT OPPORTUNITY

ARTICLE 25. SMALL BUSINESS CONCERNS

ARTICLE 26. UTILIZATION OF MINORITY BUSINESS ENTERPRISES

ARTICLE 27. MINORITY BUSINESS ENTERPRISES SUBCONTRACTING PROGRAM

ARTICLE 28. PROHIBITION AGAINST THE USE OF CONVICT LABOR

ARTICLE 29. EXAMINATION OF BOOKS AND RECORDS

ARTICLE 30. RENEGOTIATION

ARTICLE 31. DISPUTES

ARTICLE 32. VALUE ENGINEERING

CONTRACT MA/MSB-164 BETWEEN THE MARITIME SUBSIDY BOARD AND SEATRAIN SHIPBUILDING CORP. FOR CONSTRUCTION-DIFFERENTIAL SUBSIDY FOR THE CONSTRUCTION OF ONE BULK OIL TANKER VESSEL FOR POLK TANKER CORPORATION

THIS CONTRACT, ENTERED INTO AS OF THE 30th day of June, 1972, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the SECRETARY OF COMMERCE, acting by and through the MARITIME SUBSIDY BOARD (said Secretary of Commerce acting by and through the Maritime Subsidy Board being herein called the "Board") and SEATRAIN SHIPBUILDING CORP., a corporation organized and existing under the laws of the State of New York (hereinafter called the "Contractor");

WITNESSETH:

WHEREAS:

1. Pursuant to sections 501(a) and 504 of the Merchant Marine Act, 1936, as amended (herein referred to as the "Act"), all of the applicable requirements of Title V of the Act, and other applicable provisions of law, POLK TANKER CORPORATION (hereinafter called the "Purchaser"), a citizen of the United States, has made application to the Board (which term shall mean the Maritime Subsidy Board or its duly authorized representative, or the Assistant Secretary for Maritime Affairs or his duly authorized representative, as the case may be), for a construction-differential subsidy to aid in the construction of one (1) single screw steam propulsion bulk oil tanker, MA Design T10-S-92a Vessel (hereinafter called the "Vessel") to be constructed under Contract No. MA/MSB-163, (hereinafter called the "Construction Contract") for the Purchaser and to be used in the foreign commerce of the United States; and

2. The Board has determined that (a) the Plans and Specifications call for the construction of a vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for National Defense or military purposes in time of war or national emergency; (b) the Purchaser possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new Vessel; and (c) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of the Act; and

3. The Board has submitted the Plans and Specifications for the construction of the Vessel to the Department of the Navy and has received the required approval thereof; and

4. The Purchaser, in accordance with Sections 502 and 504 of the Act, has negotiated with the Contractor for the construction of the proposed Vessel in accordance with the Plans and Specifications; the Contractor has submitted a price for the construction of the Vessel; the Board considers such price to be fair and reasonable and has approved such price; the Board and the Contractor desire to enter into this Contract providing for the payment of a construction subsidy determined in accordance with Sections 502 and 504 and payment of the cost of National Defense Features; and by the Construction Contract the Purchaser has agreed to pay the remainder of the Contract Price in accordance with section 504 of the Act.

NOW, THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1. *GENERAL STATEMENT*

Contractor agrees that it shall construct and deliver, in accordance with all provisions of the Construction Contract and subject to the provisions of this Contract, the Vessel identified as

CONTRACTOR'S HULL NO.	MARITIME ADMINISTRATION HULL NO.
102	273

The Vessel shall be constructed in strict accordance with the Plans and Specifications incorporated into the Construction Contract and shall include all National Defense Features specified by the Board.

ARTICLE 2. *CONTRACT PRICE; COST OF NATIONAL DEFENSE FEATURES*

The contract price (hereinafter called the "Contract Price") for the construction of the Vessel under the Construction Contract shall be $62,872,000.00. There shall be payable in addition to the Contract Price the sum of $57,700.00 for National Defense Features.

ARTICLE 3. *CONSTRUCTION-DIFFERENTIAL SUBSIDY*

The Board shall pay to Contractor the sum of $57,700.00 as such sum may be adjusted under Article 8 of this contract, for the cost of all National Defense Features and in addition a construction-differential subsidy (determined in accordance with section 502 of the Act) in the sum of $27,017,500.00, which amount is equal to 42.97 per cent of the Contract Price, as such sum may be adjusted under Article 1(b) of Construction-Differential Subsidy Contract MA/MSB-163 with the Purchaser. The balance of the Contract Price shall be paid to Contractor

by the Purchaser under the terms of the Construction Contract.

ARTICLE 4. *PAYMENT OF CONTRACT PRICE AND COST OF NATIONAL DEFENSE FEATURES*

(a) The Board shall make to the Contractor periodic progress payments of the Board's portion of the Contract Price. Each progress payment shall be made in accordance with the provisions of Article III of the Construction Contract.

(b) The Board shall make to the Contractor periodic progress payments of the cost of National Defense Features. Each progress payment of the cost of National Defense features shall be made in relation to the progress of the contract work.

(c) Any balance of the Board's portion of the Contract Price and any balance of the cost of National Defense Features remaining unpaid at the time of delivery of the Vessel shall be due and payable by the Board upon delivery of the Vessel.

(d) The effect of any change under Article IV of the Construction Contract on the Board's obligation to make periodic progress payments shall be governed by the provisions of Article III(b) of the Construction Contract and Article 3(b) of Contract MA/MSB-165 between the Board and the Purchaser.

(e) The Board's obligation to make periodic progress payments of any increase in the cost of National Defense Features due to changes under Article 8 of this Contract shall be governed by Article 8(d) of this Contract.

ARTICLE 5. *DOMESTIC PREFERENCE*

(a) In the performance of the contract work, the Contractor, sub-contractors, materialmen or suppliers shall use, so far as practicable, only articles, materials and supplies of the growth, production or manufacture of the United States as defined in paragraph (h) of section 401 of the Tariff Act of 1930; provided, however, that with respect to other than major components of the hull, superstructure and any material used in the construction thereof, (i) if the Board determines that the requirements of this sentence will unreasonably delay completion of the Vessel beyond its contract delivery date, and (ii) if such determination includes or is accompanied by a concise explanation of the basis therefor, then the Board may waive such requirements to the extent necessary to prevent such delay.

(b) If the Board shall determine that there has been a reduction in the cost of constructing the Vessel by reason of the substitution of foreign articles, materials or supplies pursuant to paragraph (a) of this ARTICLE 5, the Board's obligation under ARTICLE 3 of this Contract shall be decreased by the full amount of such reduction in cost.

ARTICLE 6. *FUNCTIONS AND RIGHTS OF THE BOARD*

(a) With respect to the performance of the contract work under the Construction Contract, the Board shall be entitled to designate authorized representatives who shall have the authority to give directions under this Contract and where, specific provision is made therefor, under the Construction Contract. Notice of all such designations (together with a statement of the scope of authority of designee), and notice of the revocation of any prior designation shall be given to the Contractor in

writing. The Contractor shall have no obligation to follow any directions of the Board except those which shall be issued in writing over the signature of an authorized representative of the Board acting within the scope of his authority.

(b) Authorized representatives of the Board shall have reasonable access to the Vessel and work in progress during working hours for the purpose of monitoring the progress of the work and determining at the time of completion if the Vessel has been constructed in accordance with the approved Plans and Specifications incorporated into the Construction Contract. The Contractor shall make available to the Board's authorized representatives adequate office space located at or near the construction site, furnished with light, heat and air conditioning (as required by climatic conditions), telephone, desks and file cabinets and at least equivalent to the offices of Contractor's employees of comparable responsibility.

(c) Authorized representatives of the Board shall be entitled to attend all tests, ship trials, and guarantee surveys for the purpose of determining if the Vessel's performance during tests, trials and guarantee surveys meets the requirements of the Plans and Specifications. The Contractor shall provide the Board's representatives with a copy of the schedule for all tests, trials and guarantee surveys but the Contractor shall not be required to reschedule any scheduled test, trial or guarantee survey for the convenience of the Board's representative.

ARTICLE 7. *DOCUMENTS AND DATA TO BE FURNISHED TO THE BOARD*

(a) The Contractor shall furnish to the Board and, where noted, to the Board's authorized field representative, the following documents and data, which are more

fully described in the Plans and Specifications incorporated in the Construction Contract:

(i) Subject to paragraph (b) below, two copies of schedules of all working plans; two copies of all working plans, vendor plans and purchase requisitions after approval by the Purchaser and regulatory bodies concerned; two copies of the erection schedule, material control schedules, steel reports, construction progress and/or payment reports, along with photographs showing monthly progress; and prior to approval by the Purchaser, three copies of key plans as selected by the Board for such review and comment as the Board deems appropriate. Two copies of key plans and one copy of each of the other items shall be sent to the Board, Washington, D.C. One copy of all items shall be sent to the Board's authorized field representative.

(ii) Two copies of correspondence and conference reports between the Contractor and Purchaser and/or any regulatory bodies, concurrently upon issuance or receipt, relating to the construction of the Vessel. One copy of each item of correspondence and each report shall be sent to the Board, Washington, D.C. and one copy to the Board's authorized field representative.

(iii) A monthly force report which shall show the total number of employees on the Contractor's roster, the number of manhours expended on the hull during the period covered, and the cumulative number of manhours expended on the full from the date of contract award.

(iv) One copy of all certificates and documents for the Vessel.

(v) One copy of stability test data if an inclining experiment is conducted.

(vi) One copy of all trial reports for the Vessel.

(vii) One set of instruction books, including index list.

(viii) Subject to paragraph (b) below, three sets of 105 mm film, in accordance with MarAd Specification No. 18-MA-15B, of working plans as itemized and identified in the final plan schedule, including all plans (except vendors' plans) developed to comply with the requirements of the Construction Contract. The following data shall be included on 105 mm film if not shown in the plan schedules: lines plan, capacity plan, docking plan, hydrostatic curves, booklet of general arrangement plans, stability calculations, floodable length curves, and heat balance diagram. The 105 mm film shall embody an index of the plans contained therein.

(ix) One set of cloth processed tracings or mylar of the plans listed in the Specifications incorporated in the Construction Contract.

(x) Three copies of the inventory shortage list agreed upon by the Contractor and Purchaser and three copies of the inventory certification signed by the Contractor and Purchaser.

(xi) One copy of the final delivery inventory, signed by the Contractor and Purchaser, of expendable equipment and spare parts of the Vessel furnished by the Contractor and the Purchaser.

(xii) One copy of the final guarantee survey list for the Vessel.

(b) Any copy for the Board required under paragraph (a)(i) or any 105 mm film negatives required under paragraph (a)(viii) need not be provided if the same item has already been furnished to the Board in connection with another vessel or vessels. In such a case,

appropriate reference to the particular plan or film which has been furnished and a statement that it is identical to the corresponding plan applicable to the Vessel, will be sufficient.

ARTICLE 8. *CHANGES*

(a) The Board shall have the right to direct changes in the National Defense Features.

(b) Within thirty (30) days (or such longer period as the Board may approve) after receipt of the Board's written direction of a change in the National Defense Features, the Contractor shall submit to the Board its detailed estimate of the net increase or decrease in the cost of contract work and the probable delay, if any, in delivery of the Vessel to result from such change. The Contractor's estimate shall include the major components of the cost of the change, including labor, materials, engineering, overhead, and the effect on the scheduling of other work in the Contractor's yard or other commitments of the yard then pending. The Purchaser shall be invited to comment on the Contractor's estimate. The Board shall review the estimate and the Purchaser's comments, if any, along with any other cost data available to the Board and shall determine the amount of any net increase or decrease in the estimated cost of the contract work. The Board may at the same time determine the delay in the delivery of the Vessel to result from said change or may determine to make such delay determination without prejudice to the rights of the Contractor after the Vessel is delivered. One hundred and ten per cent (110%) of the net increase in the estimated cost of the contract work resulting from the change cost estimates approved by the Board shall be added to the cost of National Defense Features. In the event of a net decrease in the estimated cost of the contract work resulting from the change cost estimates ap-

proved by the Board, the cost of National Defense Features will be reduced by the amount of the net increase.

(c) The Contractor shall commence the performance of a change directed pursuant to paragraph (a) above at such time as the Board shall direct.

(d) The Contractor shall be entitled to receive partial payments of any increase in the cost of National Defense Features due to a change directed under this Article. The Board shall determine the level of progress payments and the manner in which such payments shall be made.

ARTICLE 9. *RIGHTS OF PURCHASER AND BOARD WITH RESPECT TO ENGINEERING AND DESIGN DATA*

(a) All design and engineering data furnished to the Contractor by the Purchaser shall be the sole property of the Purchaser and all such data furnished to the Contractor by the Board shall be the sole property of the Board. The use or reuse of said design and engineering data by the Contractor shall be governed by the Purchaser or the Board as their interests appear.

(b) All plans, including working plans (including reproducibles) and such other specified design and engineering data, required to be furnished to the Purchaser by the Plans and Specifications and produced by the Contractor in the performance of this Contract or the Construction Contract, shall be the sole property of the Purchaser and the Board, as their interests appear, and the Purchaser or the Board shall have the full right to use the same in such manner as each may deem proper, including without limitation to the generality of the foregoing, the right to make reproducibles and copies, the right to publish, or to withhold from publication and the right to make alterations therein, additions thereto, or other changes. Except as provided in ARTICLE 7 of this Contract, the Contractor shall be entitled to recover

the reasonable costs of reproduction and handling in the event that the Contractor is required by the Purchaser or the Board to provide copies of such plans, working plans and design and engineering data to the Board, the Purchaser or any designee of the Board or Purchaser. Unless prohibited by provision of law relating to the National Defense or security, the Contractor shall be permitted to retain copies or duplicates of such plans, working plans and design and engineering data for its own official records. The Contractor shall have the right with the approval of the Board to construct a ship or ships built to such plans, working plans and design and engineering data; provided that neither the Purchaser nor Contractor shall be entitled to any fees, commissions or other monetary benefits (except the reasonable costs of reproduction and handling) for such use or transfer.

(c) All design and engineering data, plans and working plans furnished by the Contractor in the performance of this Contract or the Construction Contract but which were not produced by Contractor in the performance of either Contract shall not become the property of the Purchaser or the Board; provided, however, that the Contractor shall commit to the Board that the Contractor will make such design and engineering data, plans and working plans available to any party that the Board may from time to time designate in return for the payment by the designated party to the Contractor of a reasonable royalty, license fee, or commission. The Contractor's commitment shall apply to both patented and unpatented design and engineering data, plans and working plans, but shall not apply to design and engineering data, plans and working plans licensed by the Contractor from an unaffiliated third party where the terms of the license prevent such a commitment by the Contractor.

(d) Unless otherwise directed by the Board or the Purchaser, the Contractor shall take reasonable precau-

tions to maintain in confidence all information contained in the Plans and Specifications disclosed to it other than information which is known to it at the time of such disclosures, or which is or shall become available to it at the time of such disclosures, or which is or shall become available to it from sources other than the Purchaser, the Board, or the Naval Architect of the Purchaser, or which is or shall become obvious to those skilled in the trade to which such information relates. Notwithstanding anything to the contrary hereinabove contained, the Contractor shall not be precluded from disclosing information which may be necessary for the prosecution of the contract work, provided only that in making such disclosure the Contractor shall impose upon any person, firm or corporation to whom such disclosure is made, conditions relating to the confidential treatment thereof to the same effect as those imposed upon it herein; nor shall the Contractor be responsible for unauthorized actions of its employees provided that the aforementioned reasonable precautions have been taken by it as hereinabove provided.

ARTICLE 10. *INJURY TO EMPLOYEES AND OTHERS; PROPERTY DAMAGE OR LOSS*

(2) The Contractor shall indemnify and save harmless the Board, the Purchaser and the Vessel against all claims arising from the injury or death of employees, workmen, trespassers, licensees and all other persons in, on or about the contract work and from damage to or loss of property of third parties due to the act, neglect or default of the Contractor, its employees, its subcontractors or their employees. For purposes of this Article, it is agreed that the workmen and employees of the Contractor or its subcontractors upon the contract work shall at all times be employees of the Contractor or its subcontractors and

shall not be employees or agents of the Board or the Purchaser.

(b) The Contractor's indemnity set forth in paragraph (a) above shall not apply to any injury or death of any person or to any damage to or loss of property of third parties occurring in connection with the Vessel after the delivery and acceptance of the Vessel by the Purchaser, provided that this exclusion shall not apply to any death occurring after delivery and acceptance due to an injury sustained prior to delivery and acceptance. Accordingly, except with respect to death resulting from an injury occurring before delivery and acceptance, the Contractor's liability to the Board, the Purchaser or the Vessel following delivery of the Vessel shall be limited to its guarantee liability as set forth in ARTICLE XVIII of the Construction Contract.

ARTICLE 11. *TOTAL LOSS OF THE VESSEL*

(a) In the event of an actual or constructive total loss of the Vessel prior to delivery, construction of the Vessel shall proceed unless the Purchaser or the Contractor shall elect within a reasonable period of time to cancel the construction. If an election is made to cancel the construction, the party electing to cancel shall give notice to that effect to the other party and the Board. If no election is made to cancel the construction, then construction and delivery of the Vessel shall proceed in accordance with this Contract and the Construction Contract, as each may have been amended. Nothing in this paragraph (a) shall prevent the Contractor from requesting an extension of the delivery date of the Vessel pursuant to the provisions of ARTICLE VI of the Construction Contract.

(b) In the event that there is an actual or constructive total loss of the Vessel prior to delivery and such loss results from the operation of an insurable risk covered by insurance as required under ARTICLE IX of the Construction Contract, all of the proceeds of such insur-

ance payable as a result of such loss shall be paid to the Board for distribution to the Purchaser and the Government in amounts equal to the total payments made by each for the lost Vessel, with the balance paid to the Contractor. Such distribution shall be made without regard to whether, under paragraph (a) above, construction is cancelled or proceeds.

(c) In the event that there is an actual or constructive total loss of the Vessel prior to delivery which is not covered by insurance and election is made by the Purchaser or the Contractor to cancel construction of the Vessel, the Contractor shall pay to the Board and the Purchaser an amount equal to all payments made under this Contract and the Construction Contract up to the date of the actual or constructive total loss.

ARTICLE 12. *INSURANCE ON THE VESSEL AND MATERIAL*

The Contractor shall be obligated to keep the Vessel and all materials, outfit equipment and appliances insured in accordance with the provisions of ARTICLE IX of the Construction Contract.

ARTICLE 13. *LIMITATION OF GOVERNMENT MONETARY OBLIGATION; LIABILITY FOR ACTS OF PURCHASER*

(a) Except as provided in ARTICLE 15 and ARTICLE 16 of this Contract, the grant of construction-differential subsidy and payment for National Defense Features shall be the exclusive monetary obligations of the Government and the Board under this Contract. The Contractor shall have no recourse under or in any way with respect to this Contract for the consequences of Government priorities, the acts of civil, naval or military authorities, or other acts or omissions of the Government acting in its soverign [sic] capacity.

(b) Neither the Government nor the Board shall be liable to the Contractor or the Purchaser for any direction, act or omission of the Purchaser made without prior written approval of the Board.

ARTICLE 14. *PATENT INFRINGEMENT*

The Contractor shall be responsible for any and all claims against the Board for infringement of patents, patent rights, copyrights or trademarks, in accordance with the provisions of ARTICLE XXVI of the Construction Contract.

ARTICLE 15. *OPTIONAL TERMINATION BY THE BOARD*

(a) Payments under this Contract for the performance of contract work under the Construction Contract may be terminated by the Board in accordance with this Article in whole, or from time to time, in part, whenever the Board shall determine that such termination is in the best interest of the United States. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which such payments and related contract work are terminated, and the date upon which such termination becomes effective. The contract work terminated as a result of termination of payments under this Contract shall include the work associated with the Purchaser's payments under the Construction Contract as well as the work associated with the payments under this Contract, *provided, that*, subject to the approval of the Board, the Purchaser and Contractor may agree to continue all or part of the contract work terminated by the Board in which event the entire cost of continuing any terminated contract work shall be for

the sole account of the Purchaser. Any terminated contract work which is continued by agreement of Purchaser and Contractor shall not be considered contract work terminated by the Board within the meaning of this Article.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Board, or agreed by Purchaser and Contractor in accordance with paragraph (a) above, the Contractor shall (i) stop the contract work on the date and to the extent specified in the Notice of Termination; (ii) place no further orders or subcontracts for material, services or facilities except as may be necessary for the completion of such portion of the contract work as is not terminated; (iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (iv) assign to the Purchaser and the Board, or to the Purchaser or the Board, as directed by the Board, in the manner, at the times, and to the extent directed by the Board, all of the right, title and interest of the Contractor under the orders or subcontracts so terminated in which case the Board shall have the right to settle and pay any and all claims arising out of the termination of such orders and subcontracts; (v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Board, to the extent that the Board may require, which approval or ratification shall be final for all purposes of this Article; (vi) transfer title to the Board (to the extent that title has not already been transferred or vested in the Purchaser) and deliver to the Purchaser or the Board, in the manner, to the extent and at the times directed by the Board (1) the fabricated or unfabricated parts, work-in-process, completed work supplies and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination,

and (2) the completed or partially completed plans, drawings, information and other property which, if the Construction Contract had been completed, would have been required to be furnished to the Purchaser and the Board; (vii) use its best efforts to sell in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Board, any property of the types referred to in provision (vi) of this paragraph (b); provided, however, that the Contractor (1) shall not be required to extend credit to any purchaser, and (2) may acquire any such property under the conditions prescribed by the Board at a price or prices approved by the Board; and provided, further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Purchaser or the Board under this Contract and the Construction Contract or shall otherwise be credited to the price or cost of the contract work or paid in such other manner as the Board may direct; (viii) complete performance of such part of the contract work as shall not have been terminated by the Notice of Termination; and (ix) take such action as may be necessary, or as the Board may direct, for the protection and preservation of the property related to the Construction Contract which is in the possession of the Contractor and in which the Purchaser or the Board has or may acquire an interest. At any time after expiration of the plant clearance period, as defined in Section VIII, Armed Services Procurement Regulations, as it may be amended from time to time, the Contractor may submit to the Board a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Board, and may request the Board to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Board will accept title to such items and remove them or enter into a storage agreement

covering the same; provided that the list submitted shall be subject to verification by the Board upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustments to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Board its termination claim in the form and with the certification prescribed by the Board. Such claim shall be submitted promptly, but in no event later than one (1) year from the effective date of termination, unless one or more extensions in writing are granted by the Board upon request of the Contractor made in writing within such one-year period or authorized extension thereof. However, if the Board determines that the facts justify such action, it may receive and act upon any such termination claim at any time after such one-year period or any extension thereof. Upon failure of the Contractor to submit a termination claim within the time allowed, the Board may determine, on the basis of information available to it, the amount, if any, due to the Contractor by reason of the termination, and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c) above, the Contractor and the Board may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of contract work pursuant to this Article, which amount or amounts may include a reasonable allowance for profit on contract work done; provided, that such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total Contract Price, as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of work so terminated. This Contract shall be amended accordingly, and the Contractor shall

be paid the agreed amount. Nothing in paragraph (e) of this Article prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Board to agree upon the whole amount to be paid shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed shall be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Board to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of contract work pursuant to this Article, the Board shall determine on the basis of information available to it the amount, if any, due to the Contractor by reason of the termination and shall pay the Contractor the amounts determined as follows:

(i) For completed contract work accepted by the Board (or sold or acquired as provided in paragraph (b) (vii) above) and not previously paid for, a sum equivalent to the aggregate price of said work computed in accordance with the Contract Price.

(ii) The total of:

(1) the costs incurred in the performance of the work terminated exclusive of any costs attributable to work paid or to be paid under paragraph (e) (i) above; and

(2) the cost of settling and paying claims arising out of the termination of contract work under subcontracts or orders, as provided in paragraph (b) (v) above, which are properly chargeable to the termination portion of the contract, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the termination date, which amounts shall be

included in the costs payable under (1) above; and

(3) a sum, as profit, not exceeding 10% of (1) above determined by the Board pursuant to Section 8.303 of the Armed Services Procurement Regulation (ASPR) in effect as of the date of execution of this contract to be fair and reasonable; provided, however, that if it appears that the Contractor would have sustained a loss on the entire Construction Contract had it been completed, no profit shall be included or allowed under this subdivision (3) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss.

(iii) The reasonable cost of settlement, including accounting, clerical and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract work, and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation and other costs incurred in connection with the protection or disposition of property allocable to the contract work. The total sum to be paid to the Contractor under (i) and (ii) of this paragraph (e) shall not exceed the total Contract Price as reduced by the amount of payments otherwise made and as further reduced by the Contract Price of work not terminated. Except for normal spoilage, and except to the extent that the Purchaser and the Board shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor under (i) and paragraph (e) (ii) (1) the fair value, as determined by the Board, of property which is destroyed, lost, stolen, or damaged so as to

become undeliverable to the Purchaser or the Board or a buyer pursuant to paragraph (b) (vii).

(f) Any determination of costs under paragraph (c) or (e) of this Article shall be governed by Section XV, ASPR, as in effect on the date of this Contract.

(g) In any case where the Board has made a determination of the amount due under paragraphs (c) or (e) above, the Board shall promptly pay to the Contractor the amount so determined by the Board.

(h) In arriving at the amount due the Contractor under this Article, there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of the contract work; (ii) any claim which the Purchaser or the Board may have against the Contractor in connection with this Contract or the Construction Contract; and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies or other things acquired by the Contractor or sold pursuant to the provisions of this Article and not otherwise recovered by or credited to the Board.

(i) If there is a partial termination of the contract work, the Board shall, on Contractor's request and prior to settlement of the terminated portion hereof, increase the price for the continued contract work by the amount, if any, the cost thereof is increased by reason of the partial termination, as determined by the Board; plus a profit determined by the Board pursuant to Section 8.303 of the ASPR in effect as of the date of execution of this Contract.

(j) The Board may from time to time, under such terms and conditions as they may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of the contract work, whenever in the opinion of the

Board the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Article, such excess shall be payable by the Contractor to the Board upon demand, together with interest computed at the rate of six per cent (6%) per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Board; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition (or such later date determined by the Board by reason of the circumstances).

(k) Unless otherwise provided for in this Contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of six (6) years after final settlement under this Contract, shall preserve and make available to the Board at all reasonable times at the office of the Contractor but without direct charge to the Board all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this Contract and the Construction Contract, and relating to the work terminated hereunder, or, to the extent approved by the Board, photographs, microphotographs, or other suitable reproductions thereof.

ARTICLE 16. *DEFAULT OF PURCHASER IN CONTRACT PAYMENTS*

(a) In the event Purchaser fails to make a required payment or payments under the Construction Contract, the Contractor may give the Purchaser and the Board written notice of such failure. Unless the Purchaser remedies such failure within fifteen (15) days from the

receipt of said written notice or such longer period as may be agreed to by the Contract, the Contractor may give written notice of the Purchaser's default to the Purchaser and the Board. Within fifteen (15) days after receipt of said notice of default or such longer period as may be agreed to by the Contractor, the Board shall give the Contractor and Purchaser written notice of one of the following:

(i) The Board's election to assume the payments required to be made by the Purchaser under the Construction Contract;

(ii) The Board's Optional termination of all contract work pursuant to Article 15 above.

(b) In the event that the Board assumes the Purchaser's payments pursuant to (a) (i) above, the Board shall promptly pay all of Purchaser's delinquent payments.

(c) A copy of the Board's notice to the Contractor, pursuant to (a) (i) or (a) (ii) above, shall be delivered to the Purchaser by the Board. As of the date of said notice, all rights of the Purchaser under this Contract and the Construction Contract and all title of the Purchaser in the Vessel and in the contract materials shall vest in the Board. All such vesting of rights and title and the assumption of obligations as provided in paragraph (b) above, are made so that the Board may thereafter proceed in the manner it deems best. Such vesting and assumption, however, shall be without prejudice to the rights and obligations as between the Purchaser and the Board.

(d) The provisions of this Article shall in no way restrict or prejudice the right of the Contractor to pursue any remedies it may have with regard to any default of the Purchaser in any of the Purchaser's obligations

under the Construction Contract, other than payments to be made by the Purchaser.

ARTICLE 17. *DEFAULT OF CONTRACTOR*

The following shall constitute events of default under this Contract:

(a) The failure of the Contractor to prosecute the contract work with such diligence and in such manner as will enable it to complete said work in accordance with the delivery date or dates set forth in the Construction Contract, except and to the extent that such failure is due to the causes stated in ARTICLE VI of the Construction Contract for which the Contractor would be entitled to an extension of a contract delivery date provided, that the Purchaser, with the approval of the Board, shall have given the Contractor notice of such failure and that the Contractor shall not, within fifteen (15) days of the date of receipt of such notice, have shown to the satisfaction of the Board that it has taken steps sufficient to remedy the failure in a manner satisfactory to the Purchaser and the Board.

(b) The failure of the Contractor in any other respect to use due diligence in the performance of the contract work or its failure to perform any of the covenants, agreements, or undertakings on its part to be performed under the Construction Contract, including but not limited to, the agreement to make prompt payment for all labor, material, services, and other charges which are to be paid by the Contractor; provided, that the Purchaser, with the approval of the Board, in either instance, shall give notice to the Contractor as to such failure, and the Contractor shall not, within fifteen (15) days after being so notified, correct any failure to use due diligence or undertake the performance of said covenants, undertakings, or agreements required to cure such failure, and

thereafter prosecute in good faith to completion all such work or performance required to cure such failure.

(c) The Contractor being dissolved or adjudged a bankrupt or making a general assignment for the benefit of its creditors, or the appointment of a receiver or receivers of any kind whatsoever, whether or not appointed in bankruptcy, common law or equity proceedings, whether temporary or permanent, for the property of the Contractor, or the filing by the Contractor of a petition for reorganization or other proceedings with reference to the Contractor, under any of the provisions of the Bankruptcy Act, or the filing of such petition by creditors and approval thereof by the Court, whether proposed by a creditor, a stockholder or any other person whatsoever.

(d) The occurrence of any other event (except an event for which the Contractor would be entitled to an extension of time for completion under the provisions of ARTICLE VI of the Construction Contract) not contemplated by this Contract or the Construction Contract which, in the opinion of the Board, would make it impossible for the Contractor to carry out its obligations under this Contract.

ARTICLE 18. *ACTION BY PURCHASER AND BOARD UPON DEFAULT*

(a) In the event that any one or more of the events of default specified in the Article 17 of this Contract shall have occurred, the Purchaser and the Board, if they so elect, may terminate this Contract. The Purchaser and the Board may then, if they so elect, proceed to have the work on the Vessel completed and for such purpose may take possession and use and occupy so much of the Contractor's Shipyard, plant, equipment, tools, machinery, and appliances, as may be needed for such purposes, without the payment of any rental or other charge there-

for to the Contractor. Contractor hereby agrees to assure to the Purchaser and the Board so long as it has the legal right to do so, such use and occupancy of the said facilities and said other property of the Contractor for such period of time as may be necessary for the completion of the contract work.

(b) In the event of termination under this Article, and if the Purchaser and the Board shall elect to have all or part of the contract work completed, the Contractor shall (i) assign such subcontracts and orders for material, services, and supplies to be used in the performance of said contract work to the Purchaser and the Board as the Purchaser and the Board may direct, and (ii) pay to the Purchaser and the Board the amount by which the total cost of the Purchaser and the Board of completing said work (including all amounts paid to the Contractor hereunder) exceeds the total Contract Price and the cost of National Defense Features provided in this Contract, as adjusted hereunder; provided, however, that in computing the amount, if any, to be paid by the Contractor to the Purchaser or the Board, appropriate adjustment shall be made for changes in the contract work subsequent to the termination of the Contract.

(c) In the event of the termination under this Article, and if the Purchaser and the Board shall elect not to complete the Vessel, the Purchaser and the Board, at any time within one hundred and twenty (120) days from the date of termination hereunder, may sell the partially completed Vessel, work-in-progress, materials, articles of machinery, outfit and equipment and supplies, together with all plans, specifications, calculations and other records required for the construction or equipment thereof. The sale shall be made free from any equity of redemption and without appraisement or valuation and shall be conducted in the manner determined by the Board. Any purchaser at any such sale shall be given reasonable time,

not less than sixty (60) days from the date of sale, within which to remove from the Contractor's plant the Vessel, work-in progress, materials, articles of machinery, outfit, equipment and supplies purchased. The Board or the Purchaser may become a purchaser at such a sale. The proceeds of the sale shall be applied, first, to payment of all costs and expenses, including reasonable attorney's fees incurred by the Purchaser and the Board or their assigns in making such sale; secondly, to reimbursement of the Purchaser and the Board for payments theretofore made by the Purchaser and the Board to the Contractor on account of the Vessel; and thirdly, to payment of any damages, demands or deficiencies arising by reason of default of the Contractor. The remaining proceeds, if any, shall be paid over to the Contractor. In the event the proceeds of the sale shall not be sufficient to pay the first, second and third items, as above set forth, the difference shall be paid to the Purchaser and the Board by the Contractor or the Contractor's surety or sureties.

(d) The rights conferred upon the Purchaser and the Board under the terms of this Article shall be in addition to, and not in substitution of, any rights which the Purchaser or the Board would have in either law or equity upon the happening of the events of default specified herein. The failure of the Purchaser and the Board to exercise the rights conferred upon them hereunder in any one or more instances of the occurrence of an event of default, as hereinbefore defined, shall not constitute a waiver of the right subsequently to terminate this Contract, as herein provided.

ARTICLE 19. *FEES*

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a

commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the Board shall have the right to annul this Contract without liability, or in its discretion to deduct from the Contract Price or consideration the amount of such commission, percentage, brokerage, or contingent fee.

ARTICLE 20. *ASSIGNMENT OF CLAIMS*

Claims for moneys due or to become due the Contractor from the Board under this Contract may be assigned, pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), to a bank, trust company, or other financial institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable by the Board under this Contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party or trustee for two or more parties participating in such financing.

ARTICLE 21. *OFFICIALS NOT TO BENEFIT NOR BE EMPLOYED*

No member of, or delegate to, Congress, or Resident Commissioner, shall be admitted to any share or part of this Contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Contract if made with a corporation for its general benefit. No member of, or delegate to Congress, or Resident Commissioner, shall be employed by the Contractor, either with or without compensation, as an attorney, agent, officer or director.

ARTICLE 22. *LABOR PROVISIONS*

(a) In connection with the performance of work under this Contract and the Construction Contract, the Contractor shall comply with the regulations of the Secretary of Labor made pursuant to the Anti-Kickback Act of June 13, 1934, 48 Stat. 948; 62 Stat. 740; 63 Stat. 108; 18 U.S.C. 874; 40 U.S.C. 276c and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances and exemptions from the requirements thereof.

(b) The Contractor shall insert in each of its subcontracts the provisions set forth in paragraph (a) of this Article and such other agreements as the Board may, by appropriate instructions, require.

(c) A breach of the provision set out in paragraphs (a) and (b) above shall be grounds for termination of this Contract.

ARTICLE 23. *WORK HOURS ACT OF 1962—OVERTIME COMPENSATION*

(a) Neither the Contractor nor any subcontractor contracting for any part of the work under this Contract or the Construction Contract shall require or permit any laborer or mechanic to be employed on such work in excess of eight (8) hours in any calendar day or in excess of forty (40) hours in any work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half (1½) times his basic rate of pay for all hours worked in excess of eight (8) hours in any

calendar day or in excess of forty (40) hours in such work week, whichever is the greater number of overtime hours.

(b) In the event of any violation of the provision of paragraph (a), the Contractor and any subcontractor responsible for such violation shall be liable to any affected employee for his unpaid wages. In addition, such Contractor or subcontractor shall be liable to the United States for liquidated damages. Said liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a), in the sum of ten dollars ($10) for each calendar day on which such employee was required or permitted to work in excess of eight (8) hours or in excess of forty (40) hours in a work week without payment of the required overtime wages.

(c) The Board may withhold, or cause to be withheld, from moneys payable on account of work performed by the Contractor or subcontractor, the full amount of wages required by this Contract and such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for liquidated damages as provided in paragraph (b).

ARTICLE 24. *EQUAL EMPLOYMENT OPPORTUNITY*

During the performance of this Contract and the Construction Contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment; upgrading; demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Board setting forth the provisions of this nondiscrimination paragraph (a).

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Board, advising the said labor union or workers' representative of the Contractor's commitments under section 202 of Executive Order No. 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended, and by the rules and regulations of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records and accounts by the Board and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

(f) In the event of the Contractor's noncompliance with the nondiscrimination provisions of this Article or with any of said rules, regulations, or orders, this Contract may be cancelled, terminated, or suspended, in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rules, regulations or orders of the Secretary of Labor or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the Board may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Board, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

ARTICLE 25. *SMALL BUSINESS CONCERNS*

It is the policy of the Federal Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns. Therefore, in performing the contract work under this Contract and the Construction Contract, the Contractor agrees to use

its best efforts to accomplish the maximum amount of contracting and subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this Contract and the Construction Contract.

ARTICLE 26. *UTILIZATION OF MINORITY BUSINESS ENTERPRISES*

(a) It is the policy of the Government that minority business enterprises shall have the maximum practicable opportunity to participate in the performance of Government contracts.

(b) The Contractor agrees to use his best efforts to carry out this policy in the award of his subcontracts to the fullest extent consistent with the efficient performance of this Contract. As used in this Contract, the term "minority business enterprise" means a business, at least fifty per cent (50%) of which is owned by minority group members or, in case of publicly-owned businesses, at least fifty-one per cent (51%) of the stock of which is owned by minority group members. For the purposes of this definition, minority group members are Negroes, Spanish-speaking American persons, American-Orientals, American-Indians, American-Eskimos, and American Aleuts. Contractors may rely on written representations by subcontractors regarding their status as minority business enterprises in lieu of an independent investigation.

ARTICLE 27. *MINORITY BUSINESS ENTERPRISES SUBCONTRACTING PROGRAM*

(a) The Contractor agrees to establish and conduct a program which will enable minority business enterprises (as defined in ARTICLE 26 of this Contract) to be con-

sidered fairly as subcontractors and suppliers under this Contract. In this connection, the Contractor shall—

(i) Designate a liaison officer who will administer the Contractor's minority business enterprises program.

(ii) Provide adequate and timely consideration of the potentialities of known minority business enterprises in all "make-or-buy" decisions.

(iii) Assure that known minority business enterprises will have an equitable opportunity to compete for subcontracts, particularly by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of minority business enterprises.

(iv) Maintain records showing (1) procedures which have been adopted to comply with the policies set forth in this clause, including the establishment of a source list of minority business enterprises, (2) awards to minority business enterprises on the source list, and (3) specific efforts to identify and award contracts to minority business enterprises.

(v) Include the Utilization of Minority Business Enterprises clause in subcontracts which offer substantial minority business enterprises subcontracting opportunities.

(vi) Cooperate with the Contracting Officer in any studies and surveys of the Contractor's minority business enterprises procedures and practices that the Contracting Officer may from time to time conduct.

(vii) Submit periodic reports of subcontracting to known minority business enterprises with respect to the records referred to in subparagraph (iv), above,

in such form and manner and at such time (not more often than quarterly) as the Contracting Officer may prescribe.

(b) The Contractor further agrees to insert, in any subcontract hereunder which may exceed $500,000, provisions which shall conform substantially to the language of this clause, including this paragraph (b), and to notify the Board of the names of such subcontractors.

ARTICLE 28. *PROHIBITION AGAINST THE USE OF CONVICT LABOR*

The Contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 29. *EXAMINATION OF BOOKS AND RECORDS*

(a) The books, files and other records of the Contractor and of any holding, subsidiary, affiliated or associated company which contain information pertinent to this Contract or the Construction Contract shall, until the expiration of three (3) years after final payment, be subject to inspection and audit by representatives of the Board.

(b) In accordance with Section 502(a) of the Act, the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three (3) years after final payment, have access to and the right to examine any pertinent books, documents, papers and records of the Contractor. The Contractor shall include in each subcontract negotiated relative to the Construction Contract, a provision giving the Comptroller General, until three (3) year [sic] after final payment, access to and the right to examine any pertinent books, documents, papers, and records of the subcontractor related to the negotiation or performance of such subcontract.

(c) For the purposes of this Article, the term "final payment" shall mean final resolution or settlement of all claims, rights and liabilities, disputes, lawsuits or other proceedings arising under this Contract or the Construction Contract.

ARTICLE 30. *RENEGOTIATION*

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (U.S.C. App. 1211, et seq.), as amended, and to any subsequent acts of Congress providing for the renegotiation of contracts. Nothing contained in this Article shall impose any renegotiation obligation with respect to this Contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing, this Contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this Article, including this paragraph (b), in all subcontracts, as that term is defined in Section 103g of the Renegotiation Act of 1951, as amended, or as subcontracts are defined in such other act.

ARTICLE 31. *DISPUTES*

Any dispute between the parties to this Contract concerning any question of fact under this Contract which is not disposed of by agreement shall be subject to the provisions of this Article. The Contractor may initiate a dispute by transmitting a letter to the Chief, Office of Ship Construction setting forth in detail the matters in dispute. The Chief, Office of Ship Construction or his duly authorized representative shall review the Contractor's transmittal and shall make every reasonable effort to reach agreement with the Contractor resolving the matters in dispute. If, after ninety (90) days from the date the Chief, Office of Ship Construction receives Contractor's letter initiating the dispute, any matters raised by Contractor's letter remain in dispute, the Chief, Office of Ship Construction shall forthwith notify the Board that a dispute is pending and shall forthwith transmit to the Board a written statement of the matters remaining in dispute. Upon receipt of such written statement, the Board or its duly authorized representative shall request from the Contractor and the Chief, Office of Ship Construction written statements of position on each matter in dispute, and any other information which the Board or its duly authorized representative deems necessary. Upon submission of the statements of position or any time thereafter, the Contractor or the Chief, Office of Ship Construction may request a hearing or the Board may, on its own motion, designate the matter or matters for hearing. In the event of such request or designation, both parties shall be afforded the opportunity to be heard and to present evidence before the Board or its duly authorized representative. The determination of the Board on each matter in dispute shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence; provided, that if the Secretary of Commerce undertakes to review the Board's determination, the Secretary's review decision shall have the finality prescribed above for the Board's determination.

ARTICLE 32. *VALUE ENGINEERING*

(a) The Contractor may submit to the Purchaser and the Board a proposal, designated as a value engineering proposal, for a modification in the Plans and Specifica-

tions incorporated in this Contract to cover a change in the contract work or material upon the basis that the changed work or material will produce substantially as satisfactory a Vessel as the work or material called for in the Plans and Specifications. The Contractor's proposal shall be accompanied by an estimate of: (i) the decrease in the estimated cost of the contract work resulting therefrom; (ii) the probable delay, if any, in delivery of the Vessel resulting therefrom and (iii) the time by which a change order adopting the proposal must be issued to secure said estimated decrease in the cost of the contract work and change in delivery date, if any.

(b) The submission of a value engineering proposal to the Purchaser and the Board by the Contractor shall in no way affect or modify the contract obligations of the Contractor to perform the contract work in strict accordance with the Plans and Specifications and to effect all deliveries in accordance with the terms of this Contract, except to the extent that a value engineering proposal is included as a change in the Plans and Specifications.

(c) The Purchaser and the Board shall make every reasonable effort to expedite their analyses of any value engineering proposal submitted by the Contractor within the time specified herein, provided, however, the Purchaser and the Board shall have no liability to the Contractor under this Contract or otherwise for any delay in taking action upon a value engineering proposal submitted by the Contractor or for any failure to take action upon the results of any such analyses.

(d) The Board shall determine whether such proposal qualifies as a value engineering change. If, prior to submission by the Contractor, the value engineering proposal has been set out in a Maritime Administration Value Engineering Informational Letter, the Contractor's proposal shall be considered to be a "non-essential" change request and handled in accordance with Article IV of this Contract.

(e) In the event the Purchaser desires to adopt all or part of a value engineering proposal, the Purchaser may direct a change in the Plans and Specifications under Article IV of this Contract; and the Purchaser shall determine the estimated reduction in contract costs allocable to such value engineering change and as to such reduction in contract costs the Contract Price shall be reduced by an amount equal to fifty percent (50%) thereof. Notwithstanding the provisions otherwise made in this Contract for payments and credits as to the Purchaser and the Board, the Purchaser's share of the Contract Price shall be reduced by the full amount of such reduction and the Board's share of the Contract Price shall not be decreased, as the result of a value engineering change being incorporated in the Plans and Specifications.

(f) To the extent the Contractor's value engineering proposals or parts thereof are accepted as value engineering changes and are embodied in a direction for a change in the Plans and Specifications pursuant to Article IV of this Contract, the Purchaser or the Board may apply any such proposals or parts thereof in the construction of other vessels under other contracts without any obligation to make payment to the Contractor for such use.

IN WITNESS WHEREOF, the United States of America, represented as aforesaid, has caused this Contract to be executed on its behalf in three counterparts, on the 30th day of June, 1972, and Seatrain Shipbuilding Corp. has caused this Contract to be executed on its behalf in three counterparts, on the 30th day of June, 1972, with the intent that each counterpart shall have full force and effect independent of the others, but full performance of one shall be full performance of all.

ATTEST:

/s/ [Illegible]
[ILLEGIBLE]
Ass't Secretary,
Maritime Subsidy
Board

UNITED STATES
OF AMERICA
SECRETARY OF
COMMERCE

MARITIME SUBSIDY
BOARD

By /s/ [Illegible]
[ILLEGIBLE]
Chairman

ATTEST:

/s/ Mary Baker
MARY BAKER
Ass't Secretary

SEATRAIN
SHIPBUILDING
CORP.

By /s/ [Illegible]
[ILLEGIBLE]
Vice President

Approved as to Form:

/s/ [Illegible]
[ILLEGIBLE]
Assistant General Counsel
Maritime Administration

Certificate as to execution by Contractor:

I, Mary Baker, certify that I am the Assistant Secretary of the company named as Contractor in the within Contract, and that Richard Sturtz, who signed the said Contract on behalf of the Contractor was then Vice-President of the said corporation; that I know his signature and that his signature thereto is genuine and that said Contract was duly signed, sealed, and attested for and on behalf of said corporation by authority of its governing body.

/s/ Mary Baker
MARY BAKER
Ass't Secretary

EXHIBIT B

MARITIME SUBSIDY BOARD
U.S. DEPARTMENT OF COMMERCE

CONTRACT MA/MSB-165

BETWEEN THE MARITIME SUBSIDY BOARD
AND POLK TANKER CORPORATION

PREAMBLE

ARTICLE 1. PAYMENT OF CONSTRUCTION-DIFFERENTIAL SUBSIDY AND COST OF NATIONAL DEFENSE FEATURES

ARTICLE 2. WITHDRAWAL FROM STATUTORY FUNDS

ARTICLE 3. CHANGES

ARTICLE 4. RIGHTS OF PURCHASER AND BOARD WITH RESPECT TO ENGINEERING AND DESIGN DATA

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ARTICLE 7. DEFAULT OF PURCHASER IN CONTRACT PAYMENTS

ARTICLE 8. OPTIONAL TERMINATION BY THE BOARD

ARTICLE 9. DOCUMENTATION AND OPERATION OF THE VESSEL

ARTICLE 10. NATIONAL DEFENSE FEATURES

ARTICLE 11. REQUISITION

ARTICLE 12. ASSIGNMENT OF CLAIMS

ARTICLE 13. ASSIGNMENT OF CONTRACT RIGHTS
ARTICLE 14. SALE OR TRANSFER OF THE VESSEL BY THE PURCHASER
ARTICLE 15. PATENT INFRINGEMENT
ARTICLE 16. VALUE ENGINEERING
ARTICLE 17. DISPUTES

THIS CONTRACT, entered into as of the 30th day of June 1972, by and between the UNITED STATES OF AMERICA (hereinafter called the "Government") represented by the SECRETARY OF COMMERCE, acting by and through the MARITIME SUBSIDY BOARD (said Secretary of Commerce acting by and through the Maritime Subsidy Board being herein called the "Board") and POLK TANKER CORPORATION, a corporation organized and existing under the laws of the State of Delaware (hereinafter called the "Purchaser"):

WITNESSETH:

WHEREAS:

1. Pursuant to Sections 501(a) and 504 of the Merchant Marine Act, 1936, as amended (hereinafter referred to as the "Act"), all of the applicable requirements of Title V of the Act, and other applicable provisions of law, the Purchaser, a citizen of the United States, has made application to the Board (which term shall mean the Maritime Subsidy Board or its duly authorized representative, or the Assistant Secretary for Maritime Affairs or his duly authorized representative, as the case may be), for a construction-differential subsidy to aid in the construction of one (1) single screw steam propulsion bulk oil tanker, MA design T10-S-92a vessel (hereinafter called the "Vessel") to be constructed under Contract No. MA/MSB-163 (hereinafter called the "Construction Contract"), for the Purchaser and to be used in the foreign commerce of the United States; and

2. The Board has determined that (a) the Plans and Specifications call for the construction of a vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for National Defense or military purposes in time of war or national emergency; (b) the Pur-

chaser possesses the ability, experience, financial resources, and other qualifications necessary for the operation and ~~maintenance of the~~ proposed new Vessel; and (c) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of the Act; and

3. The Board has submitted the Plans and Specifications for the construction of the Vessel to the Department of the Navy and has received the required approval thereof; and

4. The Purchaser, in accordance with Sections 502 and 504 of the Act, has negotiated with the Contractor for the construction of the proposed Vessel in accordance with the Plans and Specifications; the Contractor has submitted a price for the construction of the Vessel; the Board considers such price to be fair and reasonable and has approved such price; the Board and the Contractor are simultaneously herewith entering into construction-differential subsidy Contract No. MA/MSB-165 providing for the payment of a construction subsidy determined in accordance with Sections 502 and 504, and payment of the cost of National Defense Features; and by the Construction Contract the Purchaser has agreed to pay the remainder of the Contract Price in accordance with Section 504 of the Act.

NOW THEREFORE, in consideration of the premises and of the mutual promises hereinafter set forth, the parties hereto agree as follows:

ARTICLE 1. *PAYMENT OF CONSTRUCTION-DIFFERENTIAL SUBSIDY AND COST OF NATIONAL DEFENSE FEATURES*

(a) The contract price (hereinafter called the "Contract Price") for the construction of the Vessel under the Construction Contract shall be $62,872,000.00. There

shall be payable in addition to the Contract Price the sum of $57,700.00 for National Defense Features. The Board shall pay to the Contractor, in accordance with the provisions of Construction-Differential Subsidy Contract MA/MSB-164 with the Contractor, the sum of $57,700.00 as such sum may be adjusted under Article 8 of said Contract MA/MSB-164, for the cost of all National Defense Features and, in addition, a construction-differential subsidy (determined in accordance with Section 502 of the Act) in the sum of $27,017,500.00, which amount is equal to 42.97 per cent of the Contract Price, as such sum may be adjusted under Articles 1(b) and 1(c) of this Contract. The balance of the Contract Price shall be paid to the Contractor by Purchaser under the terms of the Construction Contract.

(b) The Board shall also pay to the Contractor as construction-differential subsidy 42.97 per cent of any increase in the Contract Price determined by the Board under Article 3 of this Contract to be eligible for subsidy participation; provided, however, that in the event there is a decrease in the Contract Price due to a change in the contract work or other reason, the Board's obligation to the Contractor shall be reduced by 42.97 per cent of the amount of the decrease. Progress payments of the Board's portion of any increase in Contract Price due to a change under the Construction Contract shall be governed by Article 3(b) of this Contract.

(c) The Board shall pay to the Purchaser as construction-differential subsidy 42.97 per cent of the Purchaser's cost, not exceeding for subsidy purposes the total sum of $70,000.00, for the plan approval and inspections (including architectural and engineering services together with related travel, reproduction and communication expenses) required for the construction of the Vessel and furnished by Purchaser; provided that such costs shall be subject to audit by the Board, and provided further

that the cost of Purchaser's design work, plan approval and inspections eligible for subsidy shall not include salaries or expenses of officers or employees of the Purchaser which would be paid out of the Purchaser's administrative overhead independently of the construction work and shall not include costs incurred by assignment of ship officers and crew as inspectors of construction unless approved by the Board.

ARTICLE 2. *WITHDRAWAL FROM STATUTORY FUNDS*

(a) The Board hereby authorizes the Purchaser to withdraw from its Capital Construction Fund an amount equal to the Purchaser's portion of the cost of the Vessel approved by the Board for construction-differential subsidy, less any trade-in allowance payable to the Contractor, and, to the extent authorized by the Capital Construction Fund Agreement, amounts for any additional capital costs incurred by the Purchaser in connection with the construction of the Vessel.

(b) Unless otherwise determined by the Board, the proceeds of the construction or permanent loan financing obtained with respect to the Vessel and insured under Title XI of the Act shall be deposited in the statutory fund from which Purchaser has made withdrawals as authorized in paragraph (a), in the amount of the withdrawals so made.

ARTICLE 3. *CHANGES*

(a) No change in the contract work under the Construction Contract shall be aided with subsidy unless the Purchaser notifies the Board in writing of its intention to request subsidy for the change. The Purchaser shall submit its request for subsidy within 45 days (or such longer period as the Board may approve) after a change is proposed or directed giving the reasons for and the advantages of the change. The Purchaser shall, at

the same time, submit the Contractor's detailed estimate of the major components of cost of such change, including labor, materials, engineering and overhead; of the effect on weight, moments and centers; and of the delay in delivery of the Vessel anticipated as a result of the change, together with a description of any completed work eliminated or modified and any acquired materials which would not be used and the effect, if any, of the proposed change upon any guarantee under the Construction Contract. The Purchaser shall also submit any agreement with the Contractor as to the cost and delay attributable to the change. Upon consideration of the Purchaser's request, the Board in its discretion shall approve or disapprove the change for subsidy unless the change involved arises under Article IV(b)(i) of the Construction Contract in which case the Board shall approve the change for subsidy. The Board in its discretion may approve the change for subsidy participation upon the basis of an amount equal to an adjustment in the Contract Price for the Vessel as agreed to by the Purchaser and Contractor or upon the basis of such lesser amount as the Board may determine to be fair and reasonable.

(b) In the event that the Board elects to subsidize a change, the Board's obligation to make periodic progress payments shall be increased accordingly, provided that any increase in the level of progress payments due to a change occurring prior to a determination of the Board to subsidize the change shall be for the sole account of the Purchaser and the Board's portion, if any, of the increase in progress payments made shall be remitted directly to the Purchaser.

(c) In the event any change results in a decrease in the cost of the contract work, the Purchaser shall submit to the Board the Contractor's detailed estimate of and/or the Purchaser's and Contractor's agreement as to the decrease in the cost of the contract work resulting from

the change. Upon consideration of the Contractor's detailed estimate and/or the agreement, as well as other available cost and price data, the Board shall, for the purpose of subsidy only, determine the amount of the decrease in the Contract Price resulting from the change. The Board's obligation to pay subsidy and the Board's obligation to make progress payments shall be decreased by 42.97 per cent of such decrease in Contract Price.

(d) The Board shall have the right to determine for subsidy purposes whether any change or direction by the Purchaser regarding performance of the contract work, which is accepted by the Contractor as a no-cost development or a no-cost change, results in a decrease in the cost of the contract work. If the Board determines that any such change or direction does result in a decrease in the cost of the contract work, the Board's obligation to pay subsidy and the Board's obligation to make progress payments shall be reduced by 42.97 per cent of such decreased costs.

ARTICLE 4. *RIGHTS OF PURCHASER AND BOARD WITH RESPECT TO ENGINEERING AND DESIGN DATA*

(a) All design and engineering data furnished to the Contractor by the Purchaser shall be the sole property of the Purchaser, and all such data furnished to the Contractor by the Board shall be the sole property of the Board. The use or reuse of said design and engineering data by the Contractor shall be governed by the Purchaser or the Board as their interests may appear.

(b) All plans, including working plans (including reproducibles) and such other specified design and engineering data, required to be furnished to the Purchaser by the Plans and Specifications and produced by the Contractor in the performance of the Construction Contract, shall

be the sole property of the Purchaser and the Board, as their interests appear, and the Purchaser or the Board shall have the full right to use the same in such manner as each may deem proper, including without limitation to the generality of the foregoing, the right to make reproducibles and copies, the right to publish, or to withhold from publication and the right to make alterations therein, additions thereto, or other changes. Except as provided in Article 7 of Construction-Differential Subsidy Contract MA/MSB-164 between the Board and the Contractor, the Contractor shall be entitled to recover the reasonable costs of reproduction and handling in the event that the Contractor is required by the Purchaser or the Board to provide copies of such plans, working plans and design and engineering data to the Board, the Purchaser or any designee of the Board or Purchaser. Unless prohibited by provision of law relating to the National Defense or security, the Contractor shall be permitted to retain copies or duplicates of such plans, working plans and design and engineering data for its own official records. The Contractor shall have the right with the approval of the Board to construct a ship or ships built to such plans, working plans and design and engineering data and the Contractor shall have the right with the approval of the Board to transfer such plans, working plans and design and engineering data; provided that neither Purchaser nor Contractor shall be entitled to any fees, commissions or other monetary benefits (except the reasonable costs of reproduction and handling) for such use or transfer.

(c) All design and engineering data, plans and working plans furnished by the Contractor in the performance of the Construction Contract but which were not produced by Contractor in the performance of that Contract shall not become the property of the Purchaser or the Board; provided, however, that the Contractor shall commit to the Board that the Contractor will make such design and

engineering data, plans and working plans available to any party that the Board may from time to time designate in return for the payment by the designated party to the Contractor of a fair and reasonable royalty, license fee, or commission. The Contractor's commitment shall apply to both patented and unpatented design and engineering data, plans and working plans, but shall not apply to design and engineering data, plans and working plans licensed by the Contractor from an unaffiliated third party where the terms of the license prevent such a commitment by the Contractor.

(d) Unless otherwise directed by the Board or the Purchaser, the Contractor shall take reasonable precautions to maintain in confidence all information contained in the Plans and Specifications disclosed to it other than information which is known to it at the time of such disclosures, or which is or shall become available to it from sources other than the Purchaser, the Board, or the Naval Architect of the Purchaser, or which is or shall become obvious to those skilled in the trade to which such information relates. Notwithstanding anything to the contrary hereinabove contained, the Contractor shall not be precluded from disclosing information which may be necessary for the prosecution of the contract work, provided only that in making such disclosure the Contractor shall impose upon any person, firm or corporation to whom such disclosure is made, conditions relating to the confidential treatment thereof to the same effect as those imposed upon it herein; nor shall the Contractor be responsible for unauthorized actions of its employees provided that the aforementioned reasonable precautions have been taken by it as hereinabove provided.

(e) Where the Purchaser furnishes design and engineering data to the Contractor for the construction of the Vessel under the Construction Contract, Purchaser agrees that such design and engineering data will be made available to the Board or any designee of the Board at a later date upon the request of the Board for use in connection with the construction of other vessels, provided that where the design and engineering data furnished by Purchaser is licensed by the Purchaser from an unaffiliated third party and the terms of the license prevent Purchaser from making the data available to the Board or its designee, the Purchaser need not comply with this paragraph (e). If the preparation of the design and engineering data furnished by the Purchaser in connection with the Construction Contract has been subsidized by the Board, the design and engineering data shall be made available to the Board or its designee without the payment of any fee, commission or other monetary benefit (except the reasonable costs of reproduction and handling). If such preparation has not been subsidized, a fair and reasonable royalty, license fee or commission for the use of such design and engineering data shall be paid.

ARTICLE 5. *INSURANCE*

(a) Commencing with delivery and acceptance of the Vessel, the Purchaser agrees to insure the Purchaser's interest in the Vessel against all marine and war risks and keep the same insured in such amounts and in such forms as the Board may from time to time require. The Purchaser further agrees that, if required by the Board, Purchaser will insure the interest of the Government in the Vessel against the risk of total loss for the period of 20 years commencing with the date of the delivery of the Vessel by the Contractor to the Purchaser, or so long as the Board pays to the Purchaser an operating-differential subsidy in connection with the operation of the Vessel, whichever period is longer. The interest of the Government in the Vessel shall be the amount determined by the Board prior to commencement of any policy year to be attributable to the construction-differential sub-

sidy paid by the Government pursuant to Construction-Differential Subsidy Contract MA/MSB-164 between the Board and the Contractor, and payments made by the Government pursuant to said Contract for the cost of National Defense Features. If, at the commencement of a policy year, the total amount of insurance procurable by the Purchaser in the American and British insurance markets and from the Maritime Administration, to the extent the Administration is authorized to insure under the existing law, is less than the amount of insurance required pursuant to this Article, the insurance secured by the Purchaser for such policy year shall first be applied to cover the interest of the Purchaser and, if the Board shall advise the Purchaser that the interest of the Board should be insured, the balance, if any, of such insurance shall be applied to cover the Board's interest as defined herein.

(b) All insurance required on the Purchaser's interest hereunder shall be taken out in the name of the Purchaser for its account or in the name of and for the account of any person with a security interest in the Vessel and shall provide that the losses payable thereunder shall be paid to the Purchaser or its designee, or to such other person possessing such security interest. All such insurance shall be placed with insurance companies, underwriters, associations, or underwriting funds or firms satisfactory to the Board. During any period in which the Board requires that its interest in the Vessel be insured, the insurance policies covering the Vessel shall provide that, in the event of an actual, constructive or agreed total loss of the Vessel, the underwriters shall pay direct to the Board the amount of the interest of the Government required to be insured for the policy year in which the Vessel is lost.

(c) During any period in which the Board requires that its interest in the Vessel be insured, duplicates of

cover notes and policies (or copies of binders or certificates of entry in lieu thereof) and certificates of entry in protection and indemnity associations in connection with all insurance on the Vessel required hereunder shall be delivered to the Board for approval and custody.

(d) The Purchaser agrees to keep the premium and other charges on all insurance required on the Vessel hereunder fully paid. If the Board requires the Purchaser to insure the interest of the Government in the Vessel, the Board agrees promptly to pay Purchaser an amount equal to those costs paid by the Purchaser in excess of the costs which the Purchaser would have paid if the Purchaser had insured only the Purchaser's interest, as such excess shall be certified to the Board by the Purchaser's underwriter or underwriters.

(e) The Purchaser agrees that it will not do any act, nor voluntarily suffer or permit any act to be done which would cause any insurance to be suspended, impaired, or defeated and will not voluntarily suffer or permit the Vessel to engage in any voyage, nor to carry any cargo not permitted under the policies of insurance in effect, without first covering the Vessel to the amount herein provided with insurance satisfactory to the Board for such voyage or the carriage of such cargo.

(f) The Purchaser agrees that nothing in this Contract shall be deemed to limit or restrict in any way the insurance coverage on the Vessel which the United States may require by virtue of the provisions of any mortgage or operating-differential subsidy contract or any other agreement pertaining to the Vessel.

(g) The foregoing provisions of this Article shall run with the title to the Vessel and shall be binding on all owners thereof.

ARTICLE 6. *LIMITATION OF GOVERNMENT MONETARY OBLIGATION; LIABILITY FOR ACTS OF PURCHASER*

(a) Except as provided in Article 7 and Article 8 of this Contract, the grant of construction-differential subsidy and payment for National Defense Features shall be the exclusive monetary obligations of the Government and the Board under this Contract. The Purchaser shall have no recourse under or in any way with respect to this Contract for the consequences of Government priorities, the acts of civil, naval, or military authorities, or other acts or omissions of the Government acting in its sovereign capacity.

(b) Except for the obligation to pay construction-differential subsidy, and the cost of National Defense Features as herein provided, neither the Government nor the Board shall be liable to the Contractor or the Purchaser for any direction, act or omission of the Purchaser made without prior written approval of the Board.

ARTICLE 7. *DEFAULT OF PURCHASER IN CONTRACT PAYMENTS*

(a) In the event Purchaser fails to make a required payment or payments under the Construction Contract, the Contractor may give the Purchaser and the Board written notice of such failure. Unless the Purchaser remedies such failure within fifteen (15) days from the receipt of said written notice or such longer period as may be agreed to by the Contractor, the Contractor may give written notice of the Purchaser's default to the Purchaser and the Board. Within fifteen (15) days after receipt of said notice of default or such longer period as may be agreed to by the Contractor, the Board shall give the Contractor and Purchaser written notice of one of the following:

(i) The Board's election to assume the payments required to be made by the Purchaser under the Construction Contract; or

(ii) The Board's Optional Termination of all contract work pursuant to Article 8 below and Article 15 of Construction-Differential Subsidy Contract MA/MSB-164 with the Contractor.

(b) In the event that the Board assumes the Purchaser's payments pursuant to (a) (i) above, the Board shall promptly pay all of Purchaser's delinquent payments and shall make all future payments as they come due under Construction-Differential Subsidy Contract MA/MSB-164 with the Contractor, and under the Construction Contract.

(c) A copy of the Board's notice to the Contractor, pursuant to (a) (i) or (a) (ii) above shall be delivered to the Purchaser by the Board. As of the date of said notice, all rights of the Purchaser under this Contract and the Construction Contract and all title of the Purchaser in the Vessel and in the contract materials shall vest in the Board. All such vesting of rights and title and the assumption of obligations as provided in (b) above, are made so that the Board may thereafter proceed in the manner it deems best. Such vesting and assumption, however, shall be without prejudice to the rights and obligations as between the Purchaser and the Board.

(d) The provisions of this Article shall in no way restrict or prejudice the right of the Contractor to pursue any remedies it may have with regard to any default of the Purchaser in any of the Purchaser's obligations under the Construction Contract other than payments to be made by the Purchaser.

ARTICLE 8. *OPTIONAL TERMINATION BY THE BOARD*

(a) In the event that the Board exercises its right under Article 15 of Construction-Differential Subsidy Contract MA/MSB-164 with the Contractor to terminate, in whole or in part, its construction-differential subsidy payments to the Contractor, the Board shall pay to the Purchaser the sum of:

(i) all payments made by Purchaser under the Construction Contract for contract work terminated by the Board, including payments for costs determined by the Board to be ineligible for subsidy;

(ii) all payments made by Purchaser for items described in Article 1(c) of this Contract for the design work, plan approval and inspections related to contract work terminated by the Board;

(iii) all expenses of the Purchaser incurred after termination with the express written approval or ratification of the Board in settlement of the Purchaser's outstanding liabilities for items determined by the Board to be either eligible for subsidy or ineligible for subsidy, but capitalizable;

(iv) all payments Purchaser is required to make to the Contractor on account of the Board's termination; and

(v) any other expenses or payments of the Purchaser which the Board in its discretion determines are properly reimbursable.

(b) The Purchaser shall submit its termination claim in the form and with the certification prescribed by the Board no later than one (1) year after receipt of Notice of Termination, unless one or more extensions in writing are granted by the Board upon request of the Purchaser made in writing within such one-year period or authorized extension thereof.

(c) Any terminated contract work which is continued by agreement of Purchaser and Contractor in accordance with Article 15(a) of Contract MA/MSB-164 shall not be considered contract work within the meaning of this Article.

ARTICLE 9. *DOCUMENTATION AND OPERATION OF THE VESSEL*

(a) The Vessel shall remain documented under the laws of the United States for not less than twenty (20) years from the date of delivery of the Vessel by the Contractor to the Purchaser or so long as there is outstanding a preferred ship mortgage from the Purchaser insured under Title XI of the Act, whichever is the longer period, subject, however, to the provisions of section 611 of the Act.

(b) (i) Purchaser hereby agrees, in accordance with section 506 of the Act, that the Vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the Vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the Vessel is operated in the domestic trade on any of the above-enumerated services, Purchaser will pay annually to the Board that proportion of one twentieth of the construction-differential subsidy paid for the Vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voy-

ages completed during the preceding year; and (ii) Purchaser agrees to comply in all other respects with section 506 of the Act.

(c) (i) Purchaser agrees that the Vessel shall be operated in accordance with all regulations adopted by the Board pursuant to Section 905(a) of the Act governing operation in United States foreign commerce of bulk cargo vessels on which a construction-differential subsidy has been paid, and (ii) the Secretary of Commerce has determined that there are not sufficient U.S. ports to permit safe and commercially feasible trading by the Vessel or by the vessels constructed under the other Multiple Ship Contracts. The Vessel is hereby authorized to engage in the carriage of liquid bulk cargoes between points anywhere in the world. The Purchaser agrees that if the Secretary of Commerce determines that sufficient U.S. ports have become available to permit safe and commercially feasible trading to the United States, the proposed regulations contained in the *Federal Register* of Thursday, March 23, 1972 the "Proposed Regulations" shall apply to the vessel unless the Maritime Administration shall have promulgated regulations under Section 905(a) of the Act which are, in the opinion of the Purchaser, more favorable than the provisions of the Proposed Regulations or the provisions of Section 905(a) shall have been modified so that, in the opinion of the Purchaser, the trading requirements applicable to the vessel shall be more favorable to the Purchaser than the Proposed Regulations. For purposes of determining compliance with the Proposed Regulations, cargo carried by the Vessel and the vessels constructed under the other Multiple Ship Contracts shall be aggregated and compliance shall be determined for all such vessels on an aggregate basis.

(d) The foregoing provisions of this Article shall run with the title to the Vessel and be binding on all owners thereof.

ARTICLE 10. *NATIONAL DEFENSE FEATURES*

(a) The Purchaser agrees that, for the purposes of paragraphs (b) and (c) below, the foreign cost of the National Defense Features incorporated into the Vessel shall be as follows:

(1)	(2)	(3)
Feature	U.S. Cost, per Vessel, of Feature	Foreign Cost, per Vessel, of Feature
Prohibition of Grey Cast Iron	$14,500.00	$ 8,269.00
Fueling at Sea and High Line Transfer	$43,200.00	$24,637.00

provided that in the event the cost of National Defense Features is increased or decreased by reason of a change or changes, the foreign cost of National Defense Features will be adjusted accordingly.

(b) The Purchaser agrees that, with respect to the National Defense Features referred to in paragraph (a) above, the Purchaser will not, at any time during the economic life of the Vessel, alter such Features in a manner which adversely affects their value or utility without the consent of the Board.

(c) The Purchaser agrees that, with respect to the National Defense Features referred to in paragraph (a) above, should the Purchaser, at any time during the twenty (20) year life of the Vessel, utilize any of such Features or should the American Bureau of Shipping and/or the United States Coast Guard, during the same period, amend their rules so as to require incorporation in the Vessel of any of said National Defense Features, the Purchaser shall pay to the Board an amount equal to the foreign cost of the Features utilized or incorporated, depreciated over a twenty (20) year life. Pay-

ment shall be made at the time Purchaser first utilizes any feature or at the time the applicable rules are changed. Payment may be made in a lump sum or in equal annual installments over the remainder of the twenty (20) year economic life of the Vessel. Purchaser liability under this paragraph shall exist only during the first twenty (20) years after delivery of the Vessel by the Contractor.

(d) Purchaser agrees to advise the Board immediately if the National Defense Features referred to above become subject to adjustment as provided herein, and to furnish annually to the Maritime Administration a certificate as to whether these features are used or whether the applicable Coast Guard and/or American Bureau of Shipping rules or certificates have been changed.

ARTICLE 11. *REQUISITION*

(a) It is agreed that in the event that the United States shall, through purchase or requisition, acquire ownership of the Vessel after the completion of the construction of the Vessel, the Purchaser shall be paid therefor the value of the Vessel, but in no event shall such payment exceed (1) the actual depreciated construction cost of the Vessel (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of National Defense Features) less the depreciated amount of construction-differential subsidy theretofore paid by the Board incident to the construction of the Vessel, or (2) the fair and reasonable scrap value of the Vessel, as determined by the Board, whichever is the greater. Such determination shall be final. In computing the depreciated value of the Vessel, depreciation shall be computed on the schedule adopted by the Internal Revenue Service for income tax purposes.

(b) The provisions of this Article shall run with title to the Vessel and be binding on all owners thereof.

ARTICLE 12. *ASSIGNMENT OF CLAIMS*

Claims for moneys due or to become due the Contractor from the Board under this Contract may be assigned, pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), to a bank, trust company, or other financial institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable by the Board under this Contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party or trustee for two or more parties participating in such financing.

ARTICLE 13. *ASSIGNMENT OF CONTRACT RIGHTS*

Except for any assignment made pursuant to Title XI of this Act, the Purchaser may not assign its rights under this Contract or the Construction Contract without the written consent of the Board.

ARTICLE 14. *SALE OR TRANSFER OF THE VESSEL BY THE PURCHASER*

(a) The Purchaser shall not sell or transfer the Vessel within a period of twenty (20) years from the date of delivery of the Vessel by the Contractor to the Purchaser without the prior written approval of the Board nor shall Purchaser enter into a lease, bareboat charter or charter for the Vessel which lease, bareboat charter or charter extends for more than ten (10) years, without such prior written approval. The findings under Sections 501 (a), 502 and 504 of the Act with respect to a ship purchaser's ability, experience, financial resources and other

qualifications necessary for the operation and maintenance of the Vessel shall be the basis for the Board's approval or disapproval.

(b) A sale, transfer, lease or charter (as defined in paragraph (a)) of the Vessel by the Purchaser shall not release the Purchaser from any of its obligations under this Contract or the Construction Contract unless the Board approves such sale, transfer, lease or charter and agrees to release the Purchaser, provided, however, that (i) the agreement of the proposed Purchaser or transferee to be bound by all of the provisions of this Contract, and (ii) the inclusion on any bill of sale or document of transfer of all the restrictions which run with title to the Vessel shall be conditions precedent to the operative effect of any Board approval.

ARTICLE 15. *PATENT INFRINGEMENT*

The Purchaser shall be responsible for any and all claims against the Board for infringement of patents, patent rights, copyrights or trademarks resulting from compliance by the Contractor with any specific written instructions of the Purchaser relating to patent, trademark or copyright matters or from the sale, use or disposition of equipment, machinery or material furnished to the Contractor by the Purchaser.

ARTICLE 16. *VALUE ENGINEERING*

(a) The Contractor may submit to the Purchaser and the Board a proposal, designated as a value engineering proposal, for a modification in the Plans and Specifications incorporated in the Construction Contract to cover a change in the contract work or material upon the basis that the changed work or material will produce substantially as satisfactory a Vessel as the work or material called for in the Plans and Specifications. The

Contractor's proposal shall be accompanied by an estimate of: (i) the decrease in the estimated cost of the contract work resulting therefrom; (ii) the probable delay, if any, in delivery of the Vessel, resulting therefrom and (iii) the time by which a change order adopting the proposal must be issued to secure said estimated decrease in the cost of the contract work and change in delivery date, if any.

(b) The submission of a value engineering proposal to the Purchaser and the Board by the Contractor shall in no way affect or modify the contract obligations of the Contractor to perform the contract work in strict accordance with the Plans and Specifications and to effect all deliveries in accordance with the terms of the Construction Contract, except to the extent that a value engineering proposal is included as a change in the Plans and Specifications.

(c) The Purchaser and the Board shall make every reasonable effort to expedite their analyses of any value engineering proposal submitted by the Contractor within the time specified herein; provided, however, the Purchaser and the Board shall have no liability to the Contractor under this Contract or otherwise for any delay in taking action upon a value engineering proposal submitted by the Contractor or for any failure to take action upon the results of any such analyses.

(d) The Board shall determine whether such proposal qualifies as a value engineering change. If, prior to submission by the Contractor, the value engineering proposal has been set out in a Maritime Administration Value Engineering Informational Letter, the Contractor's proposal shall be considered to be a "non-essential" change request and handled in accordance with Article *IV* of the Construction Contract.

(e) In the event the Purchaser desires to adopt all or part of a value engineering proposal, the Purchaser may

direct a change in the Plans and Specifications under Article *IV* of the Construction Contract; and the Purchaser shall determine the estimated reduction in contract costs allocable to such value engineering change and as to such reduction in contract costs the Contract Price shall be reduced by an amount equal to fifty percent (50%) thereof. Notwithstanding the provisions otherwise made in this contract for payments and credits as to the Purchaser and the Board, the Purchaser's share of the Contract Price shall be reduced by the full amount of such reduction and the Board's share of the Contract Price shall not be decreased, as the result of a value engineering change being incorporated in the Plans and Specifications.

(f) To the extent the Contractor's value engineering proposals or parts thereof are accepted as value engineering changes and are embodied in a direction for a change in the Plans and Specifications pursuant to Article *IV* of the Construction Contract, the Purchaser or the Board may apply any such proposals or parts thereof in the construction of other vessels under other contracts without any obligation to make payment to the Contractor for such use.

ARTICLE 17. *DISPUTES*

Any dispute between the parties to this Contract concerning any question of fact under this Contract which is not disposed of by agreement shall be subject to the provisions of this Article. The Purchaser may initiate a dispute by transmitting a letter to the Chief, Office of Ship Construction, setting forth in detail the matters in dispute. The Chief, Office of Ship Construction, or his duly authorized representative, shall review the Purchaser's transmittal and shall make every reasonable effort to reach agreement with the Purchaser resolving the matters in dispute. If, after 90 days from the date the

Chief, Office of Ship Construction, receives Purchaser's letter initiating the dispute, any matters raised by Purchaser's letter remain in dispute, the Chief, Office of Ship Construction, shall forthwith notify the Board that a dispute is pending and shall forthwith transmit to the Board a written statement of the matters remaining in dispute. Upon receipt of such written statement, the Board or its duly authorized representative shall request from the Purchaser and the Chief, Office of Ship Construction, written statements of position on each matter in dispute, and any other information which the Board or its duly authorized representative deems necessary. Upon submission of the statements of position or at any time thereafter, the Purchaser or the Chief, Office of Ship Construction, may request a hearing or the Board may, on its own motion, designate the matter or matters for hearing. In the event of such request or designation, both parties shall be afforded the opportunity to be heard and to present evidence before the Board or its duly authorized representative. The determination of the Board on each matter in dispute shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence; provided that, if the Secretary of Commerce undertakes to review the Board's determination, the Secretary's review decision shall have the finality prescribed above for the Board's determination.

IN WITNESS WHEREOF, the United States of America, represented as aforesaid, has caused this Contract to be executed on its behalf in three counterparts, on the 30th day of June, 1972, and Polk Tanker Corporation has caused this Contract to be executed on its behalf in three counterparts, on the 30th day of June, 1972, with the intent that each counterpart shall have full force and effect independent of the others, but full performance of one shall be full performance of all.

ATTEST:

UNITED STATES OF AMERICA,
SECRETARY OF COMMERCE
MARITIME SUBSIDY BOARD:

By /s/ Robert J. Blackwell
Chairman

POLK TANKER CORPORATION

By /s/ [Illegible]
President

/s/ [Illegible]
Assistant Secretary,
Maritime Subsidy Board

ATTEST:

/s/ Mary Baker
Ass't. Secretary

Approved as to Form:

/s/ [Illegible]
Assistant General Counsel
Maritime Administration

Certificate as to execution by Purchaser:

I, Mary Baker, certify that I am the Ass't. Secretary of the company named as Purchaser in the within Contract, and that who signed the said Contract on behalf of the Purchaser was then President of the said corporation, that I know his signature and that his signature thereto is genuine and that said Contract was duly signed, sealed, and attested for and on behalf of said corporation by authority of its governing body.

/s/ Mary Baker
Ass't. Secretary

EXHIBIT C

SEATRAIN LINES, INC.
1 Chase Manhattan Plaza
New York, New York 10005

HOWARD M. PACK, *President*

July 8, 1977

Honorable Robert J. Blackwell
Assistant Secretary for
Maritime Affairs
United States Department of
Commerce
Room 3898-B
Washington, D.C.

RE: *Polk Tanker Corporation*

Dear Sir:

Seatrain Shipbuilding Corp. an affiliate of Seatrain Lines, Inc., is owner of the VLCC Stuyvesant, being constructed for Polk Tanker Corporation ("Polk") at the Seatrain shipyard. Polk, on its behalf and that of any successor in interest, as owner or bareboat charterer, hereby requests approval of the Assistant Secretary ("the Secretary") of a time charter with The Standard Oil Company, an Ohio Corporation ("Sohio") for operation of the Stuyvesant in the Alaska (domestic) trade for a period of three years from date of delivery of the vessel. In return, Polk, or such successor in interest, would agree to repay or cause to be repaid, to repay, on a monthly basis during the period of the time charter, an amount which bears the same proportion to the construction-differential subsidy paid by the government to Seatrain Shipbuilding Corp. in respect of the construction of the

Stuyvesant as the period of operation under the time charter bears to the entire life of the vessel. The Secretary is requested to grant this permission pursuant to the discretion vested in him by § 207 of the Shipping Act, 1918, [MMA] as amended ("the Act").

Polk entered in a contract for Construction Differential Subsidy for the Stuyvesant on June 30, 1972. At that time prospects for the employment of the vessel in the foreign trade appeared promising. Polk undertook to build the vessel in the expectation that a long-term charter would become available before completion of the vessel. Since that time, however, circumstances entirely beyond the control of Polk or its affiliates have made such a charter an impossibility. There is, at present, no possible way in which the vessel could be utilized in the foreign trade of the United States. Even if a charter were available, current rates would preclude any return to the vessel for interest payment or amortization.

As the Assistant Secretary is aware, due to the worldwide drop in tanker rates, Polk and its affiliates, including Seatrain Lines, Inc. and Seatrain Shipbuilding Corp. were faced with short-term cash problems which required the temporary closing of the Seatrain Shipyard, and the laying off of substantially all of its employees, and jeopardized the continuation of Seatrain's other operations.

Seatrain's short-term problems were resolved at that time through the negotiation of a loan guaranteed by the Economic Development Administration. That loan guarantee was collateralized in part, by pledges and security derived from the expected value, at completion, of the Stuyvesant. MARAD and the EDA valued the collateral based upon their expected use of the vessel in the Alaska trade.

The vessel was originally financed with $30,200,000 in Title XI insured debt financing. Level semi-annual debt

repayment of $1,528,000 (plus or minus $5,000) commenced November 1, 1975. There is currently $28,845,000 insured indebtedness outstanding on the vessel.

Seatrain Shipbuilding Corp. has outstanding notes payable to banks due in 1980, 1982 and 1983 totalling $77,000,000. The Stuyvesant will be looked to for repayment of half this amount, or $38,500,000.

In order to arrange repayment of this indebteness, substantially all of which is insured by the Department of Commerce, the vessel must be chartered. Seatrain has arranged a three-year time charter to Sohio for use in the Alaska trade at $5.40 per DWT. This time charter will generate a net cash flow sufficient to service the indebtedness on the vessel, including the second mortgage which the vessel would carry as part of a sales transaction, and the annual repayment of the pro rata portion of CDS. In addition it would generate a substantial net cash flow over the three-year charter after debt service and CDS repayment which would be available for deposit in a restricted fund to help ensure debt repayment in years following the expiration of the time charter.

Upon execution and approval of the charter, Polk would negotiate for the sale of the vessel in a leveraged lease transaction. The purchase price is to be approximately $86,000,000; financing will include the existing Title XI debt, an insured second mortgage on the vessel, and the equity owner's cash contribution.

The sale of the vessel by Polk will generate approximately $26 million in cash. Pursuant to the terms of the agreement with the equity owner, this will be placed in an interest-bearing fund to protect the equity owner against loss in the event of default. As the amount required to indemnify the equity owner declines, the amount in the fund will become available to repay the indebtedness on government insured loans, and for the building of reserves for future repayment. Thus virtually all the net

cash proceeds of the charter and the sale will be utilized to retire the government insured indebtedness and reduce the government's exposure to collection on its guarantees.

The Secretary's permission for Polk to utilize the vessel in the domestic trades is necessary for the realization of the charter and the sale revenues. Without the charter no sale is possible.

Conversely, the failure to approve the proposed time charter could trigger a default and subsequent major loss to the government. Unless the Secretary approves the proposed contract amendment, allowing Polk or its successor to utilize the vessel in the domestic trade, Seatrain faces the possibility that it will be unable to continue the repayment of the Title XI insured debt, and will be forced to default on its obligations in this respect. Thus the government faces a situation involving the very real possibility of default with respect to approximately $116,000,000 in debt insured by the Department of Commerce.

In addition to the potential loss to the government if Seatrain defaults, the Seatrain Shipyard would probably be closed. This would result in the loss of over 2,500 jobs in New York City and the loss of a valuable shipbuilding facility. Approximately 85 percent of the yard's work force are members of disadvantaged minority groups. Seatrain's experience with the previous yard closing demonstrates that the vast preponderance of these employees are not readily re-employable and will require government funded benefits.

On the other hand, the yard, if kept open, is a going facility, generating new jobs and productively employing thousands of persons in the generally depressed New York City area. The yard is attracting new orders, and will continue, on a self-sustaining basis, to help carry out

the mandate of Section 101(e) of the Act to maintain efficient facilities for shipbuilding.

The remainder of this memorandum discusses the authority of the Secretary of Commerce to enter into the proposed transaction under 207. The basis of this argument is that the language concerning preservation and improvement of collateral in § 207 is an independent grant of authority which gives the Secretary broad power to protect the government's collateral. In order to invoke this provision of § 207, the Secretary must be faced with a realistic possibility of default, an expected economic loss on default, and an economically viable method for avoiding that default. These circumstances are present here. The Secretary, therefore, has the discretion to avoid a default through the approval of this request.

I. CONGRESS GRANTED THE SECRETARY SPECIFIC AND INDEPENDENT AUTHORITY UNDER § 207 TO "PROTECT, PRESERVE OR IMPROVE THE COLLATERAL HELD . . . TO SECURE INDEBTEDNESS"

Section 207 of the Act reads, in relevant part, as follows:

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, *or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness*, in the same manner that a private corporation may contract within the scope of the authority conferred by ite charter." [Emphasis added.]

In plain terms, § 207 sets forth a specific grant of authority empowering the Secretary, to "protect, preserve, or improve" its collateral. Under that section, this grant of authority appears wholly apart from the more general reference to the other "activities authorized by this Act,"

and was intended by Congress as an addition to the authority otherwise available to the Secretary under other provisions of the Act. In fact, in 1938, Congress amended § 207 to explicitly provide for this authority, which was deemed necessary for the sound and efficient administration of the Act and for protection of the government's interests generally. It is precisely in circumstances such as those giving rise to this application that the Secretary's authority under § 207 was designed to be exercised. For unless the Secretary acts to preserve and improve its collateral in these circumstances, the government could incur substantial liabilities on its loan guarantees.

On the other hand, the approval requested here will clearly protect and improve the Secretary's collateral. The vessel must, in the immediate future, be used in the domestic trade. Currently available foreign charters would not make the government whole in the event of default. The vessel's value, and therefore the government's collateral, depends on its operation in the domestic trade; the charter for which approval is sought will therefore not only protect the government's collateral by preventing a default, but will improve it to the point where the government will have to face neither the prospect of a laid-up, unchartered asset, nor a protracted default proceeding.

The legislative history of § 207 underscores the importance attached by Congress to this specific and independent grant of authority for the preservation of collateral. In its Report, the Senate Committee on Commerce explained the amendment to § 207 as follows:

> "Section 207 of the Act now provides that 'the Commission may enter into such contracts upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this Act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter'. The amendment adds that

> it 'may make such disbursements as may, in its discretion be necessary 'to protect, preserve, or improve the collateral held by the Commission to secure indebtedness', as is the practice in the private corporation." S. Rep. No. 618, 75th Cong. 3rd Sess. (1938).

Prior to the 1938 amendments, the Act made no mention of any authority to "protect, preserve or improve" collateral; the Secretary was arguably foreclosed under § 207 from entering into contracts for that purpose. In other words, the "activities authorized by this Act" arguably did not include the preservation of collateral. This was obviously a serious gap in the Secretary's overall authority under the Act. In response, Congress amended § 207 to clearly and unequivocally provide the Secretary the authority to "protect, preserve or improve" collateral. This additional grant of authority was designed to supplement the other "activities authorized by this Act", and to correspondingly enlarge upon the scope of the Secretary's contractual authority.

It is therefore evident from a straight-forward reading of § 207 and its history that it was Congress' intent to supply the Secretary with authority under the Act to protect the government's collateral. Nor was this Congressional intent lost on those courts which have subsequently reviewed § 207, its history and its significance. As the United States District Court for the District of Columbia has stated, upon rejecting a narrow construction of § 207:

> It seems obvious from these reports that the draftsman was in doubt as to whether or not a contract 'to protect, preserve', etc., collateral was within the 'activities authorized by this act' even though the draftsman had so intended it; therefore the amendment addition was in order to make this certain. The scope of authority which may or may not have included such a purpose previously certainly included it thereafter.

> . . . [Plaintiff's contention is] to say that in constructing the word 'preserve', in Sec. 1117 the Court should find the interest of Congress to be that the Commission or any private corporation with like powers must as a rescuer of its collateral sit idly by and watch while all is lost. This does not make sense." *Dollar* v. *Land*, 82 F. Supp. 919, 923, f.n. 1. (D.D.C. 1948), rev'd on grounds that sovereign immunity not applicable, 81 U.S. App. D.C. 28, 154 F.2d 307 (1946) aff'd 330 U.S. 731 (1951).

Similarly, § 207 empowers the Secretary to take the action requested in this application. Pursuant to its authority under that section, the Secretary need not "sit idly by and watch while all is lost."

II. THE LIMITATIONS ON THE SECRETARY'S ACTION UNDER THE GENERAL AUTHORITY OF § 207 ARE NOT APPLICABLE WHEN THE SECRETARY ACTS TO PROTECT, PRESERVE, OR IMPROVE COLLATERAL

On a few occasions the Comptroller General has limited plans to utilize § 207 where there appeared to be a conflict with other provisions of the Act. In none of those cases, however, was the question of the protection, preservation or improvement of collateral in question.

It is not the applicant's contention that § 207 as a whole is a general license to avoid the terms of the Act whenever the Secretary finds it convenient to do so. The Comptroller General has ruled out such an interpretation. The Comptroller General's limitations, however, have been imposed when the Secretary has sought to utilize the general authority of § 207 to make contracts or disbursements "necessary to carry on the activities authorized by this Act" in contravention of other terms of the Act. For example, in the Opinion of the Comptroller General concerning American President Lines, B-135884, 38 Comp.

Gen. 722 (1959), a plan was disapproved whereby the Secretary would, through actions as an escrow agent, undertake liabilities in excess of those authorized by Title XI as then in effect. The justification offered by the Secretary for that undertaking was that it would aid in carrying out the policies expressed in § 101 of the Act. In ruling that the language in § 207 limited the Secretary to activities authorized by the remaining provisions of the Act, the Comptroller General was clearly on firm ground. The language of the first part of § 207 cannot be a mandate for overruling the balance of the Act. Such a reading would leave the remaining language in the Act with little purpose.

Similarly, in 1952 the Comptroller General rejected the Secretary's contention that the Comptroller General could not oversee the activities of the Maritime Administration because of the broad language in § 207 giving the Secretary authority to carry out the policies of the Act. The Comptroller General asserted that the remaining language of the Act limited the Secretary's actions. Against the Secretary's assertion of unfettered license to ignore the Act, it is hard to see how a different result could have issued. The much more narrow authority to protect, preserve, or improve collateral, however, was not in issue. Opinion of the Comptroller General concerning sales under the Merchant Marine Act of 1936. As amended, B-58323, 31 Comp. Genl. 695 (1952).

The language in the Act allowing the Secretary to protect his existing investment suffers no such limitation. By giving that language independent meaning to act in any emergency where the likely alternative could be default, the Secretary is not rendering the remaining language in the Act meaningless; absent a threat to the collateral, the Secretary's actions are limited to the express or implied terms of the Act.

The Comptroller General has recognized the need to give § 207 independent meaning in order to protect the government's collateral. In the Opinion of the Comptroller General concerning the SS Matsonia, B-151860, 43 Comp. Gen. 98 (1963), the Comptroller General found, under the authority of § 207 to protect, preserve and improve collateral, that the Secretary could reschedule debt, notwithstanding language in § 1106 which might have prohibited such an action. The Comptroller General specifically said that under such circumstances the Act must be construed so as to effectuate its policies and purposes, and so as to avoid rendering § 207 meaningless. A similar interpretation is warranted here.

III. CONGRESS INTENDED THAT THE SECRETARY'S CONTRACTUAL AUTHORITY UNDER § 207 BE BROADLY CONSTRUED

Section 207 authorizes the Secretary to contract to "carry on the activities authorized by this Act . . . in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." As the legislative history makes clear, it was Congress' intention that this analogy to the powers of a private corporation be construed as a conferral of the broadest contractual authority. The analogy employed by the drafters was designed to ensure the most expansive reading of the powers granted under § 207. As the House Report on the 1938 amendments stated in analyzing § 207:

> "The amendment (empowering the Commission to 'preserve, protect or improve' collateral) is designed to make clear a power which it is thought already existed in the Commission but about which some doubt has been expressed. Under the Act, the Maritime Commission has all the general and implied powers of a business corporation. H.R. Rep. No. 1268, 75th Cong. 3rd Sess., at 17. (1938)

Furthermore, judicial construction of the authority granted under § 207 has been similarly liberal, reflecting the thoroughly expressed, and commonly understood, legislative intent:

> "First of all as to the power [under § 207] of the Maritime Commission to enter into a transaction of the character it alleges it did, the court holds that it has the power to negotiate and to take absolute title to the stock in question. It was created, from a functional point of view, for the purpose of permitting the conduct of its business in a manner similar to that of private enterprise and free as a consequence of the ordinary inhibitions applied to the regular executive branches of the government.
>
> Its powers in this respect are similar to that of a business corporation." *Dollar* v. *Land*, supra, at 922. (citations omitted).

In short, Congress intended that the analogy to private corporations set forth in § 207 be understood as a broadly gauged grant of power to the Secretary. Congress chose to express its intention through analogy, and it is only as an analogy that the "private corporation" language of § 207 can be properly understood. Furthermore, if correctly viewed as an analogy, § 207 could sustain a restrictive reading only if Congress, in turn, is presumed to have selected an extremely poor and misleading analogy for its purposes. It is a commonplace of modern corporate law that a corporation's powers are too broadly construed, and that, in practice, few corporate acts are beyond "the scope of the authority conferred by its charter." Indeed, the traditional doctrine of *ultra vires*, which traditionally prohibited acts by a corporation beyond the "scope" of its charter, has experienced so steady and complete a decline that "within a few years the subject of *ultra vires* will be of historic value only." N. Lattin, *The Law of Corporations*, § 66 (2d ed., 1971).

Congress surely understood the import of the analogy which it selected, as corrobated by the unqualified emphasis of the legislative history on "all the general and implied powers of a business corporation" which the Secretary was intended to possess under § 207.

IV. THE SECRETARY HAS DISCRETION TO RESOLVE CONFLICTS BETWEEN § 207 AND § 506 OF THE ACT

Polk and Seatrain are seeking the Secretary's approval of a three-year transfer of the Stuyvesant to service in the Alaska trade. A transfer of this duration is required to enable Seatrain to generate the cash needed to service the debt on the Stuyvesant, and to thereby avoid default on its insured loans. Since a default by Polk and Seatrain would trigger government liability on Title XI insured debt, the Secretary's approval of this transfer should lawfully be based on its authority under § 207 to "protect, preserve or improve" collateral.

The Act contains a grant of authority under § 506 allowing the Secretary to consent to the transfer to the domestic trades for periods up to six months per year. Arguably this grant of authority conflicts with the need under § 207 for the three year charter in order to generate sufficient revenue to prevent the default by Polk and Seatrain. This conflict may be more apparent than actual, however.

Previous interpretations of § 506 have found, where economically necessary, implied authority to transfer a vessel to the domestic trades notwithstanding the statutory time limitation, Opinion of the Comptroller General concerning the S.S. Santa Leonor, B-155039, 44 Comp. Gen. 180 (1964). While the statute was admittedly silent on the point, the Comptroller General found that so long as repayment of CDS was provided, the Secretary had

authority to allow transfer of the vessel to the domestic trade. Obviously, then, the time limitations imposed by § 506 do not fully occupy the field, especially where, as both for the Santa Leonor and the Stuyvesant, economic necessity requires a transfer for a longer period of time. The implied authority found by the Comptroller General in 1964 can be equally applicable to an exercise of his authority to transfer a vessel to the domestic trade pursuant to § 207 rather than § 506.

If, however, it is accepted that § 506 does conflict with approval of this charter, then the Secretary must resolve any such conflict in the interest of effective administration of the Act, through a careful weighing of the policies underlying both §§ 207 and 506 in light of the circumstances of the particular case. Conflicts and inconsistencies arise inevitably out of the legislative drafting process, particularly where, as here, the statute in question has undergone various amendments over a forty year history. These conflicts and inconsistencies must be resolved if the Secretary is to discharge its responsibilities under the Act.

Well accepted canons of statutory construction require a resolution which allows § 207 to serve the function intended by Congress. It is axiomatic that provisions within a statute should be construed harmoniously, and should not be permitted effectively to cancel out one another. This has been otherwise stated by the United States Supreme Court as "the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another. *United States of America* v. *Louisville and Nashville Railroad Company*, 235 U.S. 314, 326 (1914). It is a rule widely followed by the courts in matters of statutory construction. *See, R.V. McGinnis Theatres* v. *Video Independent Theatres, Inc.*, 262 F. Supp. 607, 613-614 (N.D. Okla.), *aff'd*, 386 F. 2d 592 (10th Cir. 1967); *In Re Presault*

130 Vt. 343, 292 A.2d 832, 834-835 (Sup. Ct. 1972); *Cooper Motors* v. *Commissioners*, 131 Colo. 78, 279 P.2d 685, 688 (1955).

In some instances, this rule of construction may require that where two provisions of a statute cannot be construed consistently or harmoniously under all circumstances, one such section must be interpreted to prevail or supersede the other under the particular circumstances involved. Since § 506 would conflict with the Secretary's ability to take an action necessary for the preservation of the collateral in this case, § 506 would have to give way to § 207.

An illustration of the approach urged upon the Secretary here can be found in *Commissioner* v. *Credit Alliance Corp.*, 316 U.S. 107 (1941). In that case, the Supreme Court confronted a conflict betwen § 27(f) and 27(h) of the Internal Revenue Act of 1936 governing the application of "dividends—paid credit" to a corporation making distributions in liquidation. The liquidating corporation in *Credit Alliance* was seeking this credit on distributions made to its parent company. Briefly stated, under the clear terms of § 27(f), the liquidating corporation was entitled to a dividends-paid credit on this distribution to its parent company, whereas under the equally clear terms of § 27(h), a dividends-paid credit under these circumstances was prohibited. The Court chose to resolve the conflict in favor of allowing the credit in the particular case before it, and stated as follows:

> "As above said, each of the subsections of § 27 deals with a specific and particular topic. Subsection (f) deals with 'distributions in liquidation' while subsection (h) deals with 'non-taxable distributions'. If (f) applies in this case, (h) is left to cover a substantial field of other sorts of distributions. We should, of course, read the two sections as consistent rather than conflicting, if that be possible. Here, it is not only possible but begets no absurd or impractical result. We hold that (h) is not applicable to the facts of this case and that (f) is." *Commissioner* v. *Credit Alliance Corp.*, *supra*, at 111-112.

The Court's approach in *Commissioner* v. *Credit Alliance Corp.* applies with equal force to the issue presented in this application. Here, if § 207 were viewed as controlling, the result would not be either "absurd or impractical." On the contrary, unless the Assistant Secretary exercises discretion by approving the charter of the Stuyvesant for a three year period, the policy underlying § 207 will be frustrated. Without approval of this charter, the possibility of improving the government's collateral is doubtful.

The exercise of the discretionary authority under § 207, moreover, not only effectuates the policy of improving the government's collateral, but also aids in carrying out the policies set forth in § 101. By protecting the government's collateral under § 207 the government will also assure the continuation of the shipbuilding facility, rather than the potential permanent loss of the facility. The approval would, therefore, not only satisfy the statutory standard of § 207, but the broader policies underlying the Act as well.

CONCLUSION

Section 207 confers upon the Secretary specific and independent authority to "preserve, protect or improve" the government's collateral. Congress intended this authority to be exercised in circumstances such as those present here, where there is a genuine and immediate threat to the government's collateral, but also an economically viable approach to the protection of that endangered collateral, as outlined above. If, under these circumstances, the Secretary is deemed powerless to act under § 207, the expressed Congressional mandate under-

lying that section would have little practical meaning or significance. For these reasons, Polk requests that the Secretary approve its proposed time charter with Sohio for operation of the Stuyvesant in domestic trade for a period of three years.

/s/ Howard M. Pack
HOWARD M. PACK

EXHIBIT D

POLK TANKER CORPORATION
1 Chase Manhattan Plaza
New York, New York 10005

August 25, 1977

Mr. James S. Dawson, Jr.
Secretary
Maritime Administration/
Maritime Subsidy Board
Washington, D.C. 20230

Dear Mr. Dawson:

The purpose of this letter is to formalize the application of Polk Tanker Corporation ("Polk") as previously discussed with representatives of the Maritime Administration (1) to permit the repayment to the United States, under terms outlined below, as of the date of delivery of the steam propulsion oil tanker STUYVESANT (MA Hull No. 102, the "Vessel") of the amount of construction-differential subsidy and national defense features paid or to be paid by the United States to Seatrain Shipbuilding Corp. (the "Contractor") under Construction-Differential Subsidy Contract No. MA/MSB-164 entered into between the United States and the Contractor as of the 30th day of June, 1972; and (2) to authorize amendment of Title V Contract No. MA/MSB-165, entered into between the United States and Polk as of the 30th day of June, 1972, to release Polk from the restrictions, obligations and duties therein, except those contained in (i) Article 4, pertaining to the right of the United States to the engineering and design data for the vessel; and (ii) Article 11, pertaining to the purchase and requisition right of the United States to the vessel pursuant to Section 802 of the Merchant Marine Act, 1936, as

amended: it being understood that with respect to the compensation formula contained in Article 11, the amount of construction-differential subsidy repaid with interest shall be considered in the calculation of compensation.

Cancellation of the Title V Contract would permit the operation of the Vessel in the Alaska (domestic) trade without further permission from the United States.

Under arrangements now being made, at or immediately prior to the time of delivery of the Vessel by the Contractor, title thereto will be passed to United States Trust Company of New York (the "Owner Trustee"), not in its individual capacity, but as trustee under a trust agreement with General Electric Credit Corporation ("GECC") the Owner Participant. The Owner Trustee will then bareboat charter the Vessel to Queensway Tankers, Inc. ("Queensway"), and Queensway will time charter the Vessel to Sohio Petroleum Company, a wholly-owned subsidiary of The Standard Oil Company (Ohio) ("Sohio"), for use in the Alaska (domestic) trade.

Repayment of the construction-differential subsidy would be accomplished as follows:

1. Polk will execute a promissory Note (the "Note") payable to the United States in the amount of approximately $27,200,000.00 representing the aggregate amount of construction-differential subsidy and national defense features paid by the United States to the Contractor toward the construction of the Vessel with interest thereon at the same rate borne by the second tier of Title XI Debt from the date of execution. The Note will be payable in forty (40) level semi-annual installments of combined principal and interest commencing six (6) months from the date of the Note. The Note will be assumed by the Owner Trustee in connection with the purchase of the Vessel from Polk or immediately prior to its delivery from the Contractor and Polk will be released from its

obligations thereunder. The Note will be an obligation of the Owner Trustee under the Trust Agreement with GECC but will not be an obligation of the Owner Trustee in its individual capacity or of GECC. The Note will be secured by a Preferred Ship Mortgage on the Vessel to be given by the Owner Trustee in favor of the United States which will be subject and subordinate to a First Preferred Mortgage and Second Preferred Mortgage to be given by the Owner Trustee to secure obligations insured and/or guaranteed under Title XI of the Merchant Marine Act, 1936, as amended, in connection with financing the Vessel.

2. The Note will also be secured by Owner Trustee's interest in (a) the bareboat charter; (b) the Time Charter Assignment; and (c) the Seatrain Security Agreement, all of which will be assigned by the Owner Trustee to the United States. Under the terms of the Seatrain Security Agreement among Seatrain Lines, Inc., the Owner Trustee and The Chase Manhattan Bank, N.A., as depository, and the United States (under the second tier of Title XI debt and the Note) a collateral account ("Seatrain Security Fund") will be maintained by The Chase Manhattan Bank, N.A., as depository, to secure the performance by Queensway of its obligations under the bareboat charter. The rights of the Owner Trustee under the Seatrain Security Agreement will be assigned by the Owner Trustee, as security to the United States (under the second tier of Title XI Debt), and to the United States (to secure repayment on the Note). The deposits by Seatrain in the Seatrain Security Fund will be made from monies which Seatrain Lines, Inc. becomes entitled to receive under its credit agreement with Chase from a cash collateral deposit to be maintained by Seatrain with Chase (as issuer of a Letter of Credit in favor of GECC) to secure Seatrain's reimbursement obligations to Chase in respect of the said Letter of Credit.

3. All amounts which Seatrain Lines, Inc. becomes entitled to receive under its credit agreement with Chase as aforesaid shall be deposited in the Seatrain Security Fund until such time as the aggregate sum in the Title XI Reserve Fund and the Seatrain Security Fund is equal to fifty percent (50%) of the outstanding balances of the first and second tier of Title XI Debt and fifty percent (50%) of the outstanding balance of the Note; any excess of such amount shall be paid from the Security Fund to Seatrain Lines, Inc.

4. If on any date for the payment of Basic Hire under the bareboat charter Queensway has not (either from hire under assigned subcharters or from its other funds) made such payment in full, the United States shall have the right to withdraw or direct the withdrawal of the amount of the shortfall from the Seatrain Security Fund and apply it to the making of such payment. If there is no debt outstanding of the first and second tier of Title XI Debt, the United States (acting in respect of the Note) will be entitled to the same right. In addition, the United States will be able to draw upon the full amount of the Seatrain Security Fund in the event there has been a demand for payment under the guarantees in respect of the second tier of Title XI debt or if there has been acceleration of the Note. The United States will agree that, to the extent that there are not sufficient monies (not including monies in the Seatrain Security Fund) otherwise available to Queensway to enable it to make any payments of Basic Hire under the bareboat charter, Queensway may make withdrawals from Title XI Reserve Fund to the extent necessary to enable it to make such payments with the prior written approval of the United States.

5. All Title XI Reserve Fund Net Income of Queensway shall be deposited into the Title XI Reserve Fund until such time as the balance in the Title XI Reserve Fund

plus the balance in the Seatrain Security Fund shall equal fifty percent (50%) of the outstanding balance of the First and Second tier of Title XI Debt covering the Vessel; withdrawal may not be made from this fund without the prior written consent of the United States.

6. The Guarantee Fee and the Title XI Insurance Fee on the Title XI Debts shall be at the rate of ¾ of 1% per annum until such time as the United States agrees to reduce the rate to a rate per annum as determined by the Secretary based on Queensway's having obtained a long-term charter acceptable to the United States to justify such a reduction.

7. Seatrain has obtained an undertaking by The Economic Development Administration ("EDA") to subordinate its security interest and proposed mortgage lien on the BAY RIDGE to the security interest and proposed mortgage lien in favor of the United States (Marad) upon receipt by EDA of approximately $28.6M from the proceeds of the STUYVESANT to be applied to reduce its present $40M security interest in the BAY RIDGE.

8. The Seatrain Security Fund shall be released upon the happening of any one of the following conditions:

(a) If Queensway should secure a time charter or contract of affreightment, to an acceptable credit risk as determined by the Secretary, equal to at least ½ of the remaining original term of the bareboat charter wherein (i) the charter hire sufficient to service the Basic Hire of the bareboat charter is paid on a hell-and-highwater basis; (ii) the operating component of the charter hire is sufficient for all operating expenses; and (iii) there is a reasonable profit to Queensway.

(b) If Queensway were to secure a time charter or contract of affreightment meeting all the conditions in (a) above except that it was not for ½ the re-

maining original term of the bareboat charter or the Vessel (*e.g.* say a five (5)-year charter), and if this time charter plus the amount on deposit in the Vessel's Title XI Reserve Fund assured the payout of at least fifty percent (50%) of the outstanding balance of the first and second tier of Title XI Debt and the Note at the end of the charter period.

(c) If the vessel is sold to a buyer possessing acceptable substantial credit to the United States.

(c) [sic] If Queensway were to merge into a company that has sufficient assets (as determined by the United States) to service the first and second mortgages and the Note.

(e) The presence of any other conditions or circumstances which would give the United States security in an amount at least equal to any of the above four (4) conditions.

Very truly yours,

POLK TANKER CORPORATION

/s/ Stephen Russell

EXHIBIT E

POLK TANKER CORPORATION
1 Chase Manhattan Plaza
New York, New York 10005

August 26, 1977

Hon. Robert J. Blackwell
Assistant Secretary for Maritime Affairs
U.S. Department of Commerce
Room 3898-B
Washington, D.C. 20015

Re: Polk Tanker Corporation Buildings Hull No. 102

Dear Sir:

On July 8, 1977, Polk Tanker Corporation made application to you requesting, under Section 207 of the Merchant Marine Act, 1936, as amended, permission to operate the VLCC STUYVESANT, Builders Hull No. 102, in the domestic trade for a period of three years. Notice concerning that application was placed in the Federal Register July 20, 1977. It is our understanding that, to this date, no action has been taken by the Maritime Administration with regard to that application.

By this letter, Polk withdraws that application and requests the Assistant Secretary to take no further action with regard to it.

Very truly yours,

POLK TANKER CORPORATION

/s/ Steve Russell
STEVE RUSSELL

EXHIBIT F

UNITED STATES DEPARTMENT OF COMMERCE
Maritime Administration
Washington, D.C. 20015

August 31, 1977

Polk Tanker Corporation
One Chase Manhattan Plaza
New York, New York 10005

Gentlemen:

For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states. The Economic Development Agency in June 1975 agreed to guarantee additional funding to Seatrain Shipbuilding Corporation to reopen its yard to complete this vessel taking into account the same possibility. In light of the fact that several years of work and negotiations have generated no other opportunities for employment of this vessel, and being persuaded that approval of the proposed CDS repayment and the time charter of the Sohio Petroleum Company will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation, the Maritime Subsidy Board (Board)/Assistant Secretary of Commerce for Maritime Affairs (Assistant Secretary) with respect to the requests dated July 12, 1977 and August 25, 1977, from Polk Tanker Corporation (Polk) pertaining to the T.T. STUYVESANT, took the following actions on August 30, 1977:

I. By the Assistant Secretary:

A. Approved, pursuant to sections 9, 37 and 41 of the Shipping Act, 1916, as amended (the Shipping Act), the time charter by United States Trust Company of New York, as owner trustee, and Queensway Tankers, Inc., as charter owner, of the tanker Builder's Hull No. 102 (to be documented under U.S. flag and named STUYVESANT), to Sohio Petroleum Company, a Delaware corporation but not a citizen of the United States within the meaning of section 2 of the Shipping Act, for a period of three (3) years commencing on or about the date of Maritime Administration approval, for the carriage of crude oil and/or dirty petroleum products in permissible worldwide trade, upon the conditions: (1) that without the prior written approval of the Maritime Administration the vessel shall not be subchartered to aliens, except as may be permitted by General Order 59, 2d Revision, as amended; and (2) that the operating range of said vessel shall not include the Soviet Union, Latvia, Lithuania, Estonia, Czechoslovakia, Hungary, Bulgaria, Albania, North Korea, the Soviet Zone of Germany, Manchuria, the People's Republic of China, Cambodia, North Vietnam, South Vietnam, Cuba or Southern Rhodesia, unless otherwise permitted by regulations of the Department of Commerce.

II. By the Board:

A. Found, pursuant to section 501(a) of the Merchant Marine Act, 1936, as amended (the Act), that United States Trust Company, as owner trustee and Queensway Tankers, Inc., as charter owner, are acceptable transferees of the T.T. STUYVESANT, subject to both companies demonstrating their U.S.

citizenship, under section 2 of the Shipping Act, to the satisfaction of the General Counsel.

B. Approved, pursuant to Article 14 of Board Contract No. MA/MSB-165, the assignment of the T.T. STUYVESANT to United States Trust Company as owner trustee and the bareboat charter of the vessel to Queensway Tankers, Inc.

C. Authorized the repayment to the United States on the date of delivery of the T.T. STUYVESANT, of the total amount of construction-differential subsidy paid in connection with the construction of the vessel, including the cost of National Defense Features, as determined by the Maritime Administration, in the form of a promissory note issued by Polk and to be assumed by the United States Trust Company as trustee upon purchase of the vessel, payable in level installments of principal and interest, semi-annually in arrears for twenty years beginning on the date of delivery of the vessel, provided that:

(1) The note is secured by a preferred ship mortgage on the vessel to be given by the owner trustee in favor of the United States which will be subject and subordinate to a first preferred mortgage and second preferred mortgage to be given by the owner trustee to secure obligations insured and/or guaranteed under Title XI of the Act, in connection with financing the vessel.

(2) The note is also secured by the owner trustee's interest in (a) the bareboat charter; (b) the time charter; and (c) the Seatrain Security Agreement.

(3) All documents related to the repayment of CDS have been found to be satisfactory, in form and substance, to the Office of the General Counsel.

D. Determined that interest is payable on the promissory note authorized in paragraph C above, with interest thereon to be at the same rate borne by the second tier of Title XI debt from date of execution.

E. Authorized the amendment of Board Contract No. MA/MSB-165 to release the vessel owner from all restrictions, obligations and duties contained therein, except those contained in Articles 4 and 11 pertaining to the right of the Board to the engineering and design data for the vessel, and the purchase and requisition rights of the United States to the vessel pursuant to section 802 of the Act, respectively. It shall be understood that with respect to the compensation formula contained in Article 11, the amounts of CDS repaid pursuant to paragraph C above, shall be considered in the calculation of compensation.

F. Authorized the Assistant Secretary of Commerce for Maritime Affairs (the Secretary), on behalf of the Board, to accept or enter into the following documents:

1. Promissory Note from Polk;

2. Novation Agreement among United States Trust Company as owner trustee, Polk and the Secretary;

3. Security Agreement between United States Trust Company as owner trustee and the Secretary; and

4. Preferred Ship Mortgage (Third) between United States Trust Company as owner trustee and the Secretary

in substantially the form submitted, proof date August 25, 1977, or with such changes as the Secretary shall approve and delegated to the Assistant Administrator for Maritime Aids authority to take all actions necessary in connection with the administration of the above mentioned documents.

Your attention is invited to the provisions of Department of Commerce Organization Order 10-8, section 7, and we ask that you indicate your acceptance of the above actions by signing, dating, and returning the enclosed copy of this letter.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

Enclosure

EXHIBIT G

UNITED STATES DEPARTMENT OF COMMERCE
Maritime Administration
Washington, D.C. 20230

August 31, 1977

Polk Tanker Company
One Chase Manhattan Plaza
New York, New York 10005

Queensway Tankers, Inc.
110 Wall Street
New York, New York 10005

Gentlemen:

With respect to the proposed sale of the STUYVESANT (Vessel) by Polk Tanker Corporation (Polk) to The United States Trust Company of New York (Shipowner), not in its individual capacity but solely as owner trustee under a Trust Agreement between it and General Electric Credit Corporation (GECC), and the proposed additional bond sale, you are advised that on August 30, 1977, the Assistant Secretary for Maritime Affairs (Secretary) took the following actions:

I. Approved the Shipowner, not in its individual capacity but solely as owner trustee under a Trust Agreement between it and GECC, as lessor under the lease financing arrangement.

II. Found that Cove Shipping, Inc. (Cove) possesses the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

III. Approved Queensway Tankers, Inc. (Queensway) as bareboat charterer and, found pursuant to Section 1104

(b) (1) of the Merchant Marine Act, 1936, as amended (Act), subject to compliance with the requirements herein stated, and the execution of the Management Agreement required below, that Queensway and the Shipowner possess the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the Vessel.

IV. Approved the proposed sale and lease financing arrangement, whereby Polk will assign its rights and obligations under the construction contract for the Vessel to the Shipowner, pursuant to Section 8.01 of the Trust Indenture.

V. Required that the lease terms of the sale and lease proposal be subject to approval by the Maritime Administration including, but not limited to, the lease rate, indemnification, etc.

VI. Found under Section 1104(d) of the Act that the property or project with respect to which the additional guaranteed obligations will be issued remains, in his opinion, economically sound.

VII. Determined, pursuant to Sections 1101(f) and 1104(b) (2) of the Act, that the final actual cost of construction of the Vessel is as follows:

Construction Costs	$70,180,428
Net Interest	5,372,679
Total Actual Cost	$75,553,107

On this basis fixed the guarantee amount at $60,200,000, which amount does not exceed 87½% of the actual cost of the Vessel.

VIII. Found that on the basis of the repayment of construction-differential subsidy (CDS) the Vessel is eligible for a guarantee in an amount not to exceed 87½% of the actual cost of construction of the Vessel.

IX. Approved the amortization of the proposed additional obligations ($31,355,000) on a twenty year level debt service basis (equal payments of principal and interest).

X. Required Queensway to execute a Management Agreement with Cove and required that said Management Agreement be approved in form and substance by the Secretary.

XI. Required that at or prior to the guarantee closing the Economic Development Administration (EDA) subordinate its preferred position on the BAY RIDGE, presently being constructed at Seatrain, in favor of the Maritime Administration.

XII. Required that Chase Manhattan Bank, N.A., (Chase) agree to subordinate their position on the BAY RIDGE to the Maritime Administration and to EDA up to $40,000,000 even should the Letters of Credit issued by Chase for use with respect to the BAY RIDGE be drawn down.

XIII. Required that Queensway execute a Title XI Reserve Fund and Financial Agreement (Financial Agreement) in the form of our standard Financial Agreement dated December 1, 1974.

XIV. Required that Queensway deposit 100% of its profits into the Reserve Fund until it has accumulated an amount in the Reserve Fund and Seatrain Security Fund equal to 50% of the outstanding principal balance of the First and Second Mortgage.

XV. Required that for purposes of Section 12 (negative covenants) of the Financial Agreement the working capital and net worth requirements be set at $11,027,700 for both.

XVI. Required that at or prior to the guarantee closing, the Shipowner have funds available equal to the difference between the outstanding indebtedness on the Vessel

and the capitalizable cost of the Vessel (approximately $32.7 million).

XVII. Required that at the guarantee closing Queensway have working capital sufficient to supply the Vessel on its initial voyage, obtain the necessary marine insurance, and pay the Title XI guarantee and insurance fees and that an officer of Queensway certify that Queensway has this amount.

XVIII. Required that for purposes of meeting the working capital requirement of Section 12 of the Financial Agreement, 50% of the amounts in the Reserve Fund will be counted towards working capital so long as the 100% deposit of profits requirement is in effect.

XIX. Required that Seatrain establish a Seatrain Security Fund and deposit into this fund from the escrowed equity investment of GECC plus its earnings any amounts in excess of those required to protect GECC.

XX. Determined that Seatrain will not have to make deposits into the Seatrain Security Fund if the amount on deposit in the Security Fund plus the amount in the Reserve Fund equals 50% of the outstanding indebtedness (relating to the First, Second, and Third Mortgages) related to the Vessel.

XXI. Considered the release of the Seatrain Security Fund to Seatrain if any of the following conditions are met:

(A) If Queensway should secure a time charter or contract of affreightment to an acceptable credit risk, as determined by the Secretary, equal to at least ½ of the remaining original term of the bareboat charter wherein (1) the charter hire is sufficient to service the bareboat charter hire and is paid on a hell-and-highwater basis, (2) the operating component of the charter hire is sufficient for all operating expenses, and (3) there is a reasonable profit to Queensway.

(B) If Queensway should secure a time charter or contract of affreightment meeting all the conditions in (A) above except that it was not for ½ of the remaining original term of the bareboat charter, and if this time charter or contract affreightment plus the amount in Queensway's Reserve Fund assured the payout of at least 50% of the outstanding indebtedness of the Vessel at the end of the charter period.

(C) If the Vessel is sold to a buyer possessing acceptable substantial credit as determined by the Secretary.

(D) If Queensway were to merge into a company that has sufficient assets and credit, as determined by the Secretary, to service the bareboat charter hire.

(E) The presence of any other conditions or circumstances as determined by the Secretary which would give the Maritime Administration security in an amount at least equal to any of the four above stated conditions.

XXII. Required Queensway to (1) establish United States citizenship in form and manner prescribed in 46 CFR 355 within 30 days after date of this Commitment or this Commitment may be terminated by the Secretary at his sole discretion; provided, however, if a Commitment to Guarantee Obligation closing is scheduled to occur within said 30 day period, required such parties to establish United States citizenship at least 15 days prior to the Commitment to Guarantee Obligation closing and (2) submit satisfactory evidence of continuing United States citizenship on the date of Commitment to Guarantee Obligation closing, at all Guarantee closings and all Mortgage closings with pro forma evidence of citizenship to be submitted at least 10 days prior to the appropriate Commitment, Guarantee and/or Mortgage closing.

XXIII. Required the Shipowner, Polk, Cove, and GECC to submit satisfactory evidence of continuing United States citizenship at the guarantee closing.

XXIV. Required satisfactory evidence of Vessel insurance at least 10 days prior to the guarantee closing.

XXV. Required that any services performed by or for Queensway by or for an affiliated company be at a fair and reasonable rate or approved by the Secretary as to fairness and reasonableness.

XXVI. Required that at least 5 days prior to the guarantee closing Queensway submit to the Secretary a financial statement certified by an officer of the company indicating all non-Title XI debt then in existence.

XXVII. Fixed the additional investigation fee authorized by Section 1104(f) of the Act at $39,193.75, less the $3,000 amendment fee previously paid, which amount must be paid within 30 days of the date of this action but in any event prior to the guarantee closing.

XXVIII. Required that the guarantee fee under the Second Mortgage and the insurance fee under the First Mortgage be fixed at ¾% until reduced by the Secretary based upon Queensway having secured a charter justifying the reduction.

XXIX. Authorized the Assistant Administrator for Maritime Aids to approve all appropriate documents and to take such other actions as may be necessary to effectuate the purposes of this action.

XXX. Required that all documentation be in form and substance satisfactory to the Secretary.

XXXI. Authorized the execution of this letter to Polk and Queensway which will constitute a Letter Commitment to Guarantee Obligations with respect to the sale of the Vessel and additional Title XI obligations, subject

to the conditions contained herein, and required Polk and Queensway to accept the provisions hereof by signing and returning a copy to the Secretary.

Sincerely,

/s/ James S. Dawson, Jr.
JAMES S. DAWSON, JR.
Secretary

ATTACHMENT 5

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

CORRESPONDENCE BRIEF - MEMORANDUM

TO: [X] Assistant Secretary
[ ] Deputy Assistant Secretary

ACTION MEMORANDUM June 13, 1975

Subject: Seatrain Shipbuilding Corporation
Brooklyn Navy Yard, New York
Project No. 01-04-01356

W/C Guaranty-90%
$40,000,000 loan
3,000 jobs:
85% minority

Purpose: Seatrain Shipbuilding Corporation requires an EDA Guaranty of 90% of a five year $40,000,000 working capital loan to be made to Seatrain by Chase Manhattan Bank. Banks will not extend financial assistance unless the loan is secured by a government guaranty.

Existing EDA Loans and Guaranties:

Project No. 01-3-00312: Fixed Asset Loan $5,850,000, approved January 27, 1969. Principal payments were rescheduled to commence July 1, 1975. Secured by a first lien on assets of the shipyard and an assignment of the lease on the yard; guaranty of Seatrain Lines, Inc. Interest paid through December 28, 1974. Delinquent interest as of May 10: $102,275.

Project No. 01-4-00330: Working Capital Guaranty of 90% of $6,000,000 loan by Chase Manhattan Bank approved June 30, 1969, paid down to $4,700,000. Maturity date June 1, 1975. Interest is current.

Project No. 01-4-00909: Working Capital Guaranty of 90% of $12,000,000 five year loan by Continental Illinois Bank, approved May 2, 1972. Guaranteed by Seatrain Lines, Inc. Matures March 15, 1977. Interest paid through November 30, 1974. Delinquent interest as of May 30, 1975: $838,964.39. Current rate: 10½% (140% of prime).

Project No. 01-4-01155: Working Capital Guaranty of 90% of $25,000,000 five year loan, approved April 26, 1973. Guaranteed by Seatrain Lines, Inc. Secured by second lien on the Bay Ridge (Hull 103). Matures April 27, 1978. Interest paid through November 30, 1974. Delinquent interest as of May 30, 1975: $1,744,202.75. Current rate: 10½% (140% of prime).

Surname and Organization (Typed)	Prepared by	Cleared by	Cleared by	Cleared by	Cleared by	Cleared by
	GSTONER	DIRECTOR OBD	JHANSEL	LEGAL	WHENKEL	DJCAHILL
Initials and Date	[Illegible] 6/19/75	[Illegible] 6/19	[Illegible] 6/20/5	[Illegible] 6/20/75	[Illegible] 6/19/75	

Background: Seatrain ceased work on two 225,000 dwt tankers (80% and 30% completed) in December 1974 laying off approximately 3,000 workers. This loan will permit work on the two tankers to proceed to completion and will provide re-employment for the unemployed laid-off workers and others in the area and hopefully reduce the loss which MARAD and EDA would sustain if the two tankers are not completed.

The Brooklyn Navy Yard was closed on June 25, 1966, with an estimated loss of 10,000 civilian and military direct and indirect jobs. The area unemployment rate rose from about 4% to over 12%. The loss of jobs in the area surrounding the yard was estimated at 2,500. Under this circumstance, EDA, in August 1966, under

mandate of its Act (Title IV, Section 401(a)(4), Sudden Unemployment Rise) designated the Yard and nearby acres in Brooklyn as eligible for EDA assistance.

A long-term relationship of cooperation and commitment between the Federal government, the City of New York and Seatrain Shipbuilding Corporation was formed to alleviate the adverse impact of the yard-closing on this economically depressed area. Since its inception, the effort has been an innovative and often unprecedented social and economic experiment. Seatrain was to be the principal employer and the key element for the success of the long-term conversion plan.

Seatrain had many difficulties to overcome in equipping the old Navy Yard, training workers and constructing the first two tankers. Expense of converting the yard to the most modern in this country, including steel fabricating ability, originally estimated to cost $10-$14 million has amounted to $42 million. Substantial overruns were incurred on the two tankers already sold. Since the sale of these two vessels for $135 million, the oil embargo, foreign producer oil price increases and reduced oil usage caused a collapse in the tanker charter market. A further depressant was the termination of cargo preference for U.S. flag tankers operating in the foreign trade.

By December 1974, it became evident to Seatrain Shipbuilding, that under the present conditions, it could not reasonably expect to either sell or charter the two tankers then under construction, Hull 102 (about 80% completed) and Hull 103 (about 30% completed). Seatrain Lines, Inc., the parent Corporation of Seatrain Shipbuilding, due to its own depressed ship charter and container business and financial problems, was not in any position to furnish the needed working capital to meet increasing material and labor costs required to complete the tankers.

When work was suspended MARAD had already invested in the two tankers the following amounts:

	Subsidy	Title XI (Guaranteed Loans)
Hull 102	$22.1 Million	$20. Million
Hull 103	$ 9.4 Million	$ 3.5 Million

Both the MARAD investment (approximately $55 million) and the EDA investment (over $40 million) were in jeopardy if nothing was done to complete the ships. It was determined by the Department of Commerce that MARAD was not in a position, either under Section 207 authority of its Act or otherwise, to provide all of the required financing over and above the remaining subsidy and Title XI construction financing (aggregating approximately $65.5 million) which would be made available if construction of the two tankers is carried out.

Under these circumstances, the Secretary of Commerce, MARAD and EDA concluded that the continuing interest of the Government would be served if EDA guaranteed 90% of a $40,000,000 working capital loan to Seatrain.

The contemplated guarantee would provide a basis for MARAD to potentially recover its investment in the two tankers and at least extend for several years EDA's potential liability on the existing guaranteed loans. During the term of the EDA guarantee the tanker market may improve and permit sale of the two tankers at reasonable prices and other productive use may be developed for the shipyard, either of which would be favorable for repayment of existing government exposure. Other business for the yard is being actively pursued. In fact, Seatrain has obtained a $20 million contract for the construction of eight ocean-going barges, scheduled to be delivered one a month, beginning in December. The contract is subject to obtaining MARAD guaranteed mort-

gage financing for the barges. Other contracts are being negotiated.

The foregoing plan of action will hopefully result in the following additional benefits:

- Restore upwards of 3,000 primarily minority group jobs.
- Improve the depressed economic conditions of the community.
- Complete the construction of two partially completed ships rather than consign them to scrap.
- Potentially enhance the Government's likelihood of recovering its substantial previous investment.
- By re-opening the yard provide the possibility and the time necessary to convert the Yard to a profitable, viable, multi-purpose manufacturing facility which may provide for a more than temporary alleviation of unemployment.
- Strengthen the financial viability of Seatrain Lines, Inc. through debt restructure so that it will be in a position to repay the existing EDA loan and EDA guaranteed loans and permit Seatrain to continue lease payments on the Yard to New York City of approximately $1,700,000 per annum.
- Increase the possibility of recovery of the Government's existing investment in the two tankers and in the Shipyard by postponing decision as to disposition of the tankers to a future date at which time the foreign or domestic tanker market may have improved.

The basis of the Department of Commerce-MARAD-EDA decision, as outlined by MARAD is based on the imputed value ascribed to the two vessels.

MARAD believes that the two tankers could be employed in the domestic trade to carry oil from Alaska to the states. Recently, Sohio contracted with Avondale Shipyard for the construction of six 165,000 deadweight ton tankers for the Alaska trade. The estimated capitalized value of these vessels is $84 million per ship. If the Seatrain 225,000 dwt tankers were operated in the same manner as the Sohio vessels, i.e., loading only about 163,000 tons per voyage, the actual cost of transportation from Valdez, Alaska to Los Angeles, California, would be $.02 per ton less than the cost of transportation by the Sohio ships.

The Seatrain vessels would, according to MARAD, provide considerably more flexibility in this trade than the Sohio vessels. In the Valdez to Puget Sound trade, the Seatrain vessels could load 193,000 tons of crude oil due to the deeper water at the discharge terminals, and on this basis the transportation cost would be $.33 per ton lower than for the Sohio vessels. Another possibility is the employment of the Seatrain vessels carrying full loads of some 223,000 tons from Valdez to Los Angeles and lightening the ships before coming into port by transferring about 60,000 tons to a smaller tanker. MARAD found that the transportation cost, including lightering [sic] would be significantly lower than the cost of transportation by the vessels contracted by Sohio.

The EDA loan guarantee would provide maximum flexibility in that the decision as to the ultimate employment of the vessels could be deferred until after the vessels are completed. If the foreign trade conditions improve or some specific program is implemented to give relief to U.S.-flag tankers in the foreign trade, the value of the vessels in this trade may be adequate to repay the additional EDA guaranteed loans and also support the Title XI guaranteed loans. On the other hand, if either of these conditions do not materialize, there is the added option

at that time of repaying the CDS, selling the vessels for use in the Alaska trade, and repaying the proposed EDA guaranteed loan from the proceeds of such sale.

The EDA guarantee of $40,000,000 will permit Seatrain to renegotiate its current bank loan as set forth under "Terms and Conditions", providing lower interest rates and extension of maturities to give Seatrain Lines, Inc. more time to rebuild its cash flow.

Approximately $9,000,000 of Chase-Seatrain Letters of Credit will become available for completion of the Bay Ridge.

In addition, there are collateral benefits such as elimination of New York State unemployment payments and increased State and Federal income tax collections and social security withholdings.

Repayment Analysis: Since the proposed loan will be secured by a first lien on the Bay Ridge, a sales price equal to the sales price of the Sohio Tankers of $84 million per vessel for employment in the Alaska oil trade, there would be ample funds to repay the construction-differential subsidy and the new EDA guaranteed loan and also to either repay the Title XI guaranteed financing or have the purchaser assume this indebtedness. The first two tankers were sold for approximately $68 million each. There is no assurance that the tankers can be sold at either of the above figures.

As detailed hereinbefore the market for the two tankers will depend upon tanker charter demand at or subsequent to their completion. Assuming that the market will improve or that governmental aid in the form of subsidy or cargo preference or other incentive is provided for the presently distressed tanker industry, the amount of the loan could be repaid from proceeds of the first lien. Any balance could be liquidated from other sources of production and income of the shipyard.

As indicated hereinbefore Seatrain is pursuing contracts for smaller types of craft and ship work and has obtained a tentative $20 million contract for barges. MARAD believes that there is substantial business for Seatrain in this field, which should generate additional working capital and will probably also extend the completion date for the Bay Ridge to a date when a more favorable tanker market may exist. This proposed revamping of the productive output of the shipyard into various categories of marine construction, if accomplished, will provide more than a temporary alleviation of unemployment.

Since the proposed loan will run for five years, there is also the possibility of Seatrain Lines, Inc. returning to more profitable operations with repayment potential for the existing extended Continental and Chase loans from earnings. The shipbuilding operation has been a heavy financial burden to the Company. In the last year Seatrain has disposed of some of its non-profitable operations. In eight months ending February 28, 1975, Seatrain had net income of $4.3 million compared to a 1974 loss of $3.1 million. Its consolidated net worth has declined from $59 million at December 31, 1972 to near $30 million currently. The cost overruns on tanker construction contributed to this decline.

Based on the reasonable assumption that some combination of the factors discussed hereinbefore will materialize and supported by a first lien on a tanker with an imputed value sufficient to cover the $40 million loan, the Acting Deputy Assistant Secretary for Operations concludes that there is reasonable assurance of repayment of $40,000,000 (the amount of the loan) which EDA has been requested to guarantee. For reasons of loan policy between Chase and Continental Illinois, the $40,000,000 recovery will be divided between the two banks.

All statutory requirements relating to this project have been met. Other findings and the terms and conditions of the loan and guaranty are set forth on the following pages hereof.

Recommendation: It is recommended that EDA offer Chase Manhattan Bank, N. A. a 90% guaranty of a $40,000,000 working capital loan to be made by it to Seatrain Shipbuilding Corporation according to the terms and conditions of the accompanying Guaranty Agreement.

In order to facilitate loan closing, it is recommended that the Acting Deputy Assistant Secretary for Operations be authorized:

1. To execute the EDA guaranty agreement substantially in the form attached for the $40,000,000 Chase loan.
2. To execute extension agreements for the existing Continental and Chase working capital loans and extend the EDA guarantees to cover the deferment of loan maturities.
3. To approve the form and substance of the collateral documents and other loan agreements, drafts of which are included as Exhibits and containing substantially the arrangements set forth under "Terms and Conditions" on the following pages of this Action Memorandum; and to execute such documents and agreements on behalf of EDA.
4. To approve and execute an agreement (draft attached) between MARAD, Chase Manhattan, Continental Illinois Bank and Seatrain providing that EDA will have a first security interest in the Bay Ridge for $40,000,000 during construction and a first preferred ship mortgage in that amount after completion, with proceeds of sale to be applied to the EDA guaranteed Continental and Chase loans. The security interest will be filed as soon as possible but not necessarily before execution by EDA of its guaranty.

APPROVED [Illegible]

DISAPPROVED _____

DATE June 20, 1975

ADDENDUM TO SEATRAIN SHIPBUILDING CORPORATION 506

Project No. 01-04-01356

June 13, 1975

Terms and Conditions

1. The proposed $40,000,000 loan will mature in five years with interest payable monthly at a rate of 125% of prime.

2. Concurrently with, or prior to, disbursement of the loan, delinquent interest on all EDA and EDA-guaranteed loans shall be paid.

3. The principal payments to become due on the EDA $5,850,000 loan from July 6, 1975, through June 6, 1977, shall be extended to maturity. Principal payments in the monthly amount presently required shall commence July 6, 1977.

4. The Chase Bank working capital loan of $4,700,000 will be extended for five years until June 15, 1980. Interest rate: prime plus 2½%.

5. The $12 million Continental Bank loan will be extended to March 15, 1982. Interest rate: 125% of prime. The $25 million Continental Bank loan will be extended until April 27, 1983. Interest rate: 125% of prime per annum.

6. EDA guarantees on the three existing Continental and Chase working capital loans shall be extended to cover the delayed maturities and new terms of repayment of these loans.

7. The existing Chase loan to Seatrain Lines of approximately $63,000,000 will be changed to a term loan for six years, with no principal payments for two years. Principal payments will commence July 31, 1977.

8. *Collateral*:

   a. MARAD will permit EDA to have a first security interest during construction and a first preferred ship mortgage upon delivery on the Bay Ridge to secure its exposure on the $40 million Chase loan and the Continental $37 million EDA-guaranteed working capital loans. MARAD will be in second lien position. Continental Illinois Bank will release its existing second lien on the Bay Ridge. Upon sale of the Bay Ridge and payment of the $40,000,000 first lien, the resulting funds will be applied as follows:

      (i) $12,500,000 to Continental Illinois for application on the $25 million loan. (Less any amounts theretofore paid to Continental on its loans).

      (ii) $13,513,000 to Chase for application on the $40,000,000 Chase loan.

      (iii) Any balance will be applied to those loans, 37/77ths to Continental and 40/77ths to Chase, both percentages based on the Chase $40 million loan and Continental's $37 million loans.

   b. Guaranty of Seatrain Lines, Inc. of the $40,000,000 Chase loan.

9. Any prepayments of principal to either Chase or Continental on the EDA-guaranteed loans are to be divided between the two Banks in proportion to the amount of their respective loans.

10. MARAD will agree to cancellation by Chase of its outstanding letter of credit of $4,411,025 issued to provide operating funds for the Williamsburgh (Hull 101), now sold.

11. Continental Illinois will release its second lien on the Bay Ridge which secured the $25,000,000 Continental Bank-EDA guaranteed loan. Instead, Continental will share in proceeds of EDA's $40 million first lien on Bay Ridge as provided in Condition 8 hereof. It will retain a second lien on the machinery and equipment of the Shipyard.

12. The two letters of credit issued by Chase Bank for operation of the Stuyvesant ($4,411,256) and the Bay Ridge ($4,947,000) shall be modified so that these funds (aggregating $9,358,256) can be used for completion of the Bay Ridge to the extent needed (as determined by MARAD) after the funds made available from the proceeds of the $40,000,000 loan have been used unless the letters are needed for working capital for the Stuyvesant in the event it is not sold when completed. To secure these letters of credit Chase will be granted by MARAD some form of subordinate lien on the Stuyvesant and/or Bay Ridge. To the extent funds become available from this lien position, they will be used to reimburse Chase for funds expended on such letters of credit. If additional funds are available from such lien position, they may be used for loan payments to Chase and Continental and to that extent, the EDA first lien on the Bay Ridge will be reduced.

Other Findings

° The project is located within the Brooklyn Navy Yard which was designated August 19, 1966, and remains designated. The OEDP was updated March 31, 1975, and is current.

° The Office of Civil Rights of EDA has approved this project.

° Chase Manhattan will make the loan only on the basis of a 90% guaranty by EDA. Other private and/or Federal financing is unavailable.

° The proceeds of the loan will be used solely to provide working capital for project operations and will not be used for any physical expansion of Seatrain facilities or capacity.

° The project will not have a significant impact upon the quality of the human environment.

° The Guaranty Agreement requires that the project be insured in accordance with the provisions of the Flood Disaster Protection Act of 1973.

° Name checks revealed no derogatory information.

° Extension of financial assistance in this project will not violate Section 702 of the Act because it will not increase production or services heretofore available in the area.

° No information in material conflict with that presented herein is contained in the file.

Management: According to MARAD, the shipyard is one of the most modern in the country and is well managed from a technical as well as administrative viewpoint. In view of the above, OBD has concluded that this project will be efficiently administered, operated and maintained, as required by Section 604 of the Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-1645

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS, ET AL.,
Defendants.

C.A. No. 77-1647

ALASKA BULK CARRIERS, INC., and
TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS, ET AL.,
Defendants.

ORDER

Upon consideration of the cross-motions for summary judgment, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open Court, and the entire record herein, and in accordance with the Memorandum Opinion of the Court issued of even date herewith, it is, by the Court, this 22nd day of November, 1977,

ORDERED, ADJUDGED, AND DECREED, that, for the reasons articulated on pages 23-26 of the Court's Memorandum Opinion of even date herewith, and because the Secretary failed to consider the competitive effects of her decisions, the decisions of the Secretary of Commerce to accept CDS repayment by means of a 20-year promissory note and to waive permanently domestic trading restrictions on the S.S. STUYVESANT in

exchange therefor be, and the same hereby are, declared to be arbitrary and capricious and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A); and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiffs' motions for summary judgment be, and the same hereby are, granted insofar as they seek the declaratory relief ordered in the preceding paragraph; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, denied insofar as they seek judgment on plaintiffs' claim that the operative decisions with respect to the STUYVESANT were made without notice in 1975 and kept secret until 1977, and this claim will therefore remain before the Court; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, granted with respect to all of plaintiffs' claims not covered by the preceding ordered paragraphs; and it is

FURTHER ORDERED, that this case is hereby remanded to the Secretary for reconsideration, in accordance with the Memorandum Opinion issued of even date herewith, of her decisions with respect to the STUYVESANT; and it is

FURTHER ORDERED, that the Secretary shall complete the aforesaid reconsideration within 45 days of the date hereof; and it is

FURTHER ORDERED, that counsel for all parties shall be present in Courtroom 11 on November 30, 1977 at 9:30 A.M., for a status call in the above-captioned matter.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-1645

SHELL OIL COMPANY,
Plaintiff,

v.

JUANITA M. KREPS, ET AL.,
Defendants.

Civil Action No. 77-1647

ALASKA BULK CARRIERS, INC., and
TRINIDAD CORPORATION,
Plaintiffs,

v.

JUANITA M. KREPS, ET AL.,
Defendants.

ORDER

Upon consideration of the motion of plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation to amend this Court's Order of November 22, 1977, which plaintiff Shell Oil Company joined in today at the status call held herein, and it appearing to the Court that all plaintiffs seek leave to dismiss from this case the claim remaining before the Court that the Secretary's decisions with respect to the STUYVESANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977, and it appearing to the Court that this remaining claim is superfluous and would afford plaintiffs no greater relief than the remand which has already been ordered by this Court, and it further appearing that no further is-

sues remain before the Court and that there is no need for any further proceedings in this case at this time, and it further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977,

ORDERED, that plaintiffs' motion to amend this Court's Order of November 22, 1977, be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiffs' remaining claim be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

C.A. No. 77-1647

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Alaska Bulk Carriers, Inc. and Trinidad Corporation hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 30th day of November, 1977.

Respectfully submitted,

AMY LOESERMAN KLEIN
Galland, Kharasch, Calkins
& Short
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 333-2200

[Certificate of Service Omitted in Printing]

Civil Action No. 77-1645

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hearby given that Shell Oil Company, plaintiff named above, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 30th day of November, 1977.

/s/ Stephen N. Shulman
STEPHEN N. SHULMAN

CADWALADER, WICKERSHAM &
TAFT
11 Dupont Circle, Suite 450
Washington, DC 20036
(202) 387-8100

Counsel for Plaintiff

[Certificate of Service Omitted in Printing]

No. 77-1645

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenors Polk Tanker Corporation and Seatrain Shipbuilding Corporation hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 30th day of November, 1977.

Respectfully submitted,

WILLIAMS & CONNOLLY

By /s/ John W. Vardaman, Jr.
JOHN W. VARDAMAN, JR.

By /s/ William E. McDaniels
WILLIAM E. MCDANIELS
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COLES & GOERTNER

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PRESTON, THORGRIMSON,
ELLIS, HOLMAN &
FLETCHER

By /s/ Jonathan Blank
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(202) 331-1005

No. 77-1647

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the defendant-intervenors Polk Tanker Corporation and Seatrain Shipbuilding Corporation hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 30th day of November, 1977.

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January 30, 1978

[Certificate of Service Omitted in Printing]

(SERVED)
(January 6, 1978)

(MARITIME SUBSIDY BOARD)

(MARITIME ADMINISTRATION)

U.S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

Docket No. A-124

T.T. STUYVESANT—Repayment of CDS

Operation in Jones Act Trade

In the matter of remand for reconsideration as ordered by the United States District Court for the District of Columbia on November 22, 1977, in *Shell Oil Company* v. *Kreps* and *Alaska Bulk Carriers, Inc. and Trinidad Corporation* v. *Kreps*, Dockets CA Nos. 77-1645 and 77-1647.

FINAL OPINION AND ORDER
ON
REMAND FOR RECONSIDERATION

Robert J. Blackwell, Chairman and Assistant Secretary of Commerce for Maritime Affairs, and Samuel B. Nemirow, Member

SERVED UPON:

AFL-CIO Maritime Committee by Carl C. Davis, Esquire, Alvord and Alvord, 918 Sixteenth Street, N.W., Washington, D.C. 20006

Alaska Bulk Carriers by E. P. Eisenbiegler, President, P.O. Box 280, Claymont, Delaware 19703

American Petrofina, Incorporated by R. C. Low, Vice President, P.O. Box 2159, Dallas, Texas 75221

The American Waterways Operators, Inc. by Harold D. Muth, Vice President—Government Relations, 1600 Wilson Blvd., Arlington, Virginia 22209

Apex Marine Corporation by Leo V. Berger, President, 410 Lakeville Road, Lake Success, New York 11040

Crowley Maritime Corporation by Thomas B. Crowley, Chairman of the Board and President, One Market Plaza, San Francisco, California 94105

Interstate and Ocean Transport Company by Adrian S. Hooper, President, Three Parkway, Philadelphia, Pennsylvania 19102

Matson Navigation Company by David F. Anderson, Esquire and Peter P. Wilson, Esquire, P.O. Box 3933, San Francisco, California 94119

Polk Tanker Corporation and Seatrain Shipbuilding Corporation, by John W. Vardaman, Jr., Esquire, William E. McDaniels, Jr., Esquire, and Jane E. Genster, Esquire, Williams & Connolly, 1000 Hill Building, Washington, D.C. 20006

by Neal Michael Mayer, Esquire, Coles & Goertner, 1000 Connecticut Avenue, N.S. [sic], Washington, D.C. 20006

by Jonathan Blank, Esquire, Preston, Thorgrimson, Ellis, Holman & Fletcher, 1775 F Street, N.W., Washington, D.C. 20006

Shell Oil Company by Stephen N. Shulman, Esquire, Alan M. Winterhalter, Esquire, Mark C. Ellenberg, Esquire, and Walter W. Bardenwerper, Esquire, Cadwalader, Wickersham & Taft, Eleven Dupont Circle, Washington, D.C. 20036

I. INTRODUCTION

This is the final decision of the Maritime Subsidy Board (Board) and the Assistant Secretary of Commerce for Maritime Affairs (MarAd) in response to the Memorandum Opinion issued November 22, 1977, by the United States District Court for the District of Columbia in *Shell Oil Company* v. *Kreps* (CA 77-1645) and *Alaska Bulk Carriers, Inc. and Trinidad Corporation* v. *Kreps* (CA 77-1647). The District Court, while upholding certain challenged actions of MarAd/Board, held that the Secretary [1] failed to give full consideration to:

> "(1) the effect upon competition of permitting the STUYVESANT to engage in the Alaskan oil trade, and (2) the effect upon competition of permitting Polk to repay the STUYVESANT's CDS [construction-differential subsidy] with a 20-year promissory note rather than requiring immediate payment in full and/or requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain Shipbuilding." [2]

The Court held the MarAd/Board's actions were therefore arbitrary, capricious, and an abuse of discretion; remanded the case to the Secretary for reconsideration of the competitive effect of these actions; and required that a final decision be completed within 45 days.

By notice in the Federal Register on December 8, 1977 (42 FR 62025), MarAd/Board invited comments

[1] The Secretary of Commerce by Department Organization Order 10-8 has delegated various functions under the Merchant Marine Act, 1936, as amended (Act), to the Board and MarAd. Generally, the Board has exclusive authority with respect to making, amending and terminating construction-differential subsidy contracts under Title V of the Act, and MarAd has exclusive authority with respect to administering such contracts and with regard to vessel financing guarantees under Title XI of the Act.

[2] Memorandum Opinion and Order 23-24.

on the competitive impact issues which the Court directed the Secretary to consider.[3] Ten submissions in response to that Notice were received and have been given careful consideration. It is concluded that the competitive effect on domestic waterborne transportation of Alaskan oil from allowing the STUYVESANT to compete for such oil carriage and permitting repayment of CDS with a promissory note without interest from date of execution of the construction contract is none or minimal. Therefore, no further consideration of the previous MarAd/Board's STUYVESANT actions is necessary as such actions remain unchanged.

II. BACKGROUND

On June 30, 1972, the Board executed contracts with Seatrain Shipbuilding Corporation (Seatrain) and Polk with respect to construction of a 225,000 deadweight ton (DWT) tanker, subsequently named the STUYVESANT, at a contract price of $62,929,700. Under the relevant contracts the Board agreed to pay CDS funds totalling about $27 million to Seatrain. Polk, the vessel purchaser, agreed to operate the ship in the foreign trade of the United States as required by Section 506 of the Act.[4] MarAd at the same time agreed to insure under Title XI of the Act an amount which had been amortized to $28,845,000 on the delivery date of the vessel.

[3] The Notice referred to operation in the "Jones Act" trade, which is a reference principally to Section 27 of the Merchant Marine Act, 1920, as amended, 46 U.S.C. § 883 (1970). That provision limits oceanborne transportation in the coastwise trade to U.S. built, documented, and owned vessels. Tanker carriage of Alaskan oil between Alaska and the lower 48 states and Hawaii is coastwise trade.

[4] Section 506 of the Act, 46 U.S.C. § 1151 (1970) also expressly permits limited domestic operation, but only with the pro rata payback of CDS.

Over five years later, before delivery of the STUYVESANT, MarAd/Board acting on application by Polk and for stated reasons,[5] agreed on August 30, 1977, *inter alia*, to allow Polk to repay $27.2 million CDS by means of a 20-year interest-bearing promissory note secured by a third preferred ship mortgage on the vessel and thereby to remove all restrictions on operation of the vessel in domestic trade. Further, MarAd/Board approved various transactions which were consummated on September 9 and 30, 1977. Under the transactions Polk sold the vessel to the United States Trust Company (USTC) as owner-trustee for the equity-owner, General Electric Credit Corporation (GECC). USTC bareboat chartered the vessel to Queensway Tankers, Inc., which in turn time chartered the vessel to Standard Oil of Ohio (SOHIO) for three years to operate in the Alaskan oil trade. Also under the transactions, USTC assumed responsibility for $60.2 million of Title XI Government-insured or guaranteed indebtedness on the STUYVESANT, inclusive of $31.4 million incurred at the closing date through sale of new Title XI guaranteed bonds. The proceeds of these bonds were used chiefly to repay loans

[5] The reasons stated for the actions were:

"For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states. The Economic Development Agency in June 1975 agreed to guarantee additional funding to Seatrain Shipbuilding Corporation to reopen its yard to complete this vessel taking into account the same possibility. In light of the fact that several years of work and negotiation have generated no other opportunities for employment of this vessel, and being persuaded that approval of the proposed CDS repayment and the time charter of the Sohio Petroleum Company will improve the collateral position and present possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation, the following recommendations are appropriate in this instance. . . ."

of $28 million made by the Economic Development Administration (EDA), another agency of the Department of Commerce, which had loaned $5 million and guaranteed 90 percent of approximately $82 million in additional loans to Seatrain for the purpose of developing and maintaining the shipbuilding facilities of the former Brooklyn Navy Yard where Seatrain's yard is located. USTC also placed $32.6 million in an escrow account for the benefit of the equity-owner, GECC, and the further protection of MarAd.

On November 22, 1977, the District Court acted on complaints filed by Shell Oil Company (Shell), Alaska Bulk Carriers, Inc. (Alaska Bulk) and Trinidad Corporation (Trinidad) challenging the aforesaid actions of the MarAd/Board. The Court found that the Secretary of Commerce had the authority to accept repayment by 20-year promissory note without interest during the construction period. The Court also rejected plaintiffs' complaints that the procedures followed deprived them of due process of law. The Court found that in taking the STUYVESANT actions the Secretary gave

> "serious consideration to the following factors: (1) the lack of viable employment opportunities for the STUYVESANT other than in the Alaska oil trade; (2) the improvement of the Government's collateral position and the prevention of possible defaults on other outstanding obligations; and (3) the continued viability of Seatrain Shipbuilding." [6]

The Court continued that the administrative record failed to reflect that the Secretary had given full consideration to:

> "(1) the effect upon competition of permitting the STUYVESANT to engage in the Alaskan oil trade,

[6] Memorandum Opinion 23-24.

and (2) the effect upon competition of permitting Polk to repay the STUYVESANT's CDS with a 20-year promissory note rather than requiring immediate payment in full and/or requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain Shipbuilding." [7]

Such failure of consideration was found to render the Secretary's decisions with respect to the STUYVESANT arbitrary, capricious and an abuse of discretion. The Court remanded the case to the Secretary to permit consideration of protests of plaintiffs and other interested parties and to give appropriate weight to competitive effect in the ultimate decision with respect to the STUYVESANT. The Court did not stay the effectiveness of the MarAd/Board STUYVESANT actions or in any manner suggest that such actions would not remain in effect if the ultimate decision on competitive effect did not require modification of such original actions.

In response to the MarAd/Board Federal Register Notice of December 6, 1977, submissions were received from the following persons:[8]

1. Polk and Seatrain (referred to hereafter as Seatrain's submission).
2. Shell
3. Alaska Bulk and Trinidad
4. AFL-CIO Maritime Committee
5. American Petrofina, Incorporated (American Petrofina)

[7] *Id.* at 25-26.

[8] The discussion herein of submissions filed by these persons in no manner is a concession that they have standing in this matter. Discussion is merely undertaken solely in response to the District Court Memorandum Opinion and Order.

6. The American Waterways Operators, Inc. (American Waterways)
7. Apex Marine Corporation (Apex)
8. Crowley Maritime Corporation (Crowley)
9. Interstate and Ocean Transport Company (IOT)
10. Matson Navigation Company (Matson)

Based on these submissions, the studies and analyses by the MarAd/Board, and matters of which official notice are taken, the following issues are discussed with respect to the STUYVESANT actions:

1. The effect upon competition of permitting the STUYVESANT to engage in the Alaskan oil trade.
2. The effect on competition of permitting Polk to repay the STUYVESANT CDS with a 20-year promissory note and/or requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain.

In addition, comment is made on certain non-competitive impact issues raised in the submissions.

III. DISCUSSION

In discussing the competitive effect of the STUYVESANT actions, it is not in any manner implied that competitive effect is the sole and/or paramount consideration relevant to the STUYVESANT actions. As the Court found, other relevant factors have already been fully considered but it is necessary in addition to consider the factor of competitive effect.[9]

[9] Since it is herein found that the competitive effect properly considered is nil or minimal it is unnecessary to consider further "the appropriate weight" to be given competitive effect.

A. *Competitive Effect—STUYVESANT in Alaskan Oil Trade*

The following were suggested by several persons submitting comments as adverse competitive effects resulting from permitting the STUYVESANT to operate in the Alaskan oil trade without time limitation:

(i) Displacement of present and contemplated unsubsidized vessels,

(ii) Reduction in domestic charter rates and rates of return,

(iii) Inhibition or prevention of new domestic trade construction[,]

(iv) Inherently unfair competition from mere presence of STUYVESANT,

(v) Loss of jobs, and

(vi) Lack of fair warning to domestic trade operators.

1. *Displacement*

The principal charge of unfair competitive effect from employing the STUYVESANT in the Alaskan oil trade is that based on a supply and demand analysis of the unsubsidized tanker vessels required and available, the STUYVESANT will displace unsubsidized tanker vessels from the Alaskan trade. The persons submitting comments and analyzing this supply and demand data have the following differences in projections of the surplus (+) or shortage (—) in large tankers in the Alaskan trade:

Table—Projection of Surplus/Shortage
In Large Tankers (000 DWT)

Year	Seatrain *	Shell	Alaska Bulk/Trinidad **
1978 2d Quarter		—147.4	—1283
1978 3d Quarter	—494		
1980 1st Quarter	—446	+170.1	+ 36

* Seatrain's estimates are based on its derived conversion factors using MarAd data. Using its own data Seatrain calculates different conversion factors from which it estimates a surplus/shortage of —1135.75 for second quarter 1978 and —889.5 for first quarter 1980.

** Alaska Bulk/Trinidad do not make separate estimates for large and small tankers and their estimates are for all tankers.

There is general agreement on the formula to be followed in the supply-demand analysis. The following factors must be considered in that formula and were directly or indirectly considered by all concerned persons:

(a) Availability of Alaskan oil

(b) West Coast absorption of Alaskan oil

(c) Surplus shipments via Panama

(d) Conversion factor to be used to convert barrels per day to DWT required to transport the oil

(e) Availability of non-subsidized tankers for Alaskan trade

(a) *Availability of Alaskan Oil*

In July 1977 the oil discovered in the north slope of Alaska began flowing through the Trans Alaska Pipeline System (TAPS). During the year a series of difficulties plagued the pipeline, particularly damage to pump station 8. It is expected by all, however, that by March 1978 the damage to pump station 8 will be repaired and the throughput will be increased at that time to 1.2 million barrels per day (b/d), an increase of approximately 500,000 b/d from the December 1977 through-

put. The north slope fields can produce at levels above 1.2 million b/d suggesting further increases in the throughput of TAPS in the future. Shell argues that because the pipeline cannot carry more than 1.2 million b/d without additional construction of pumping facilities and no such construction is presently planned, TAPS cannot be expected to exceed 1.2 million b/d through 1979 or 1980. Nonetheless, Shell, along with Alaska Bulk and Trinidad, follows the 1976 estimates of MarAd [10] that the availability of Alaskan oil (TAPS and South Alaska) will be 1.35 million b/d in April 1978 (1978.2) and 1.5 million b/d by January 1980 (1980.1). Seatrain uses the same estimates but as applicable only to throughput at TAPS.

There is every reason to continue in the assumption that because of the high capital cost of construction of TAPS and north slope development some or all of the private backers will successfully urge as great a rate of throughput as can be economically sustained in order to gain as early as possible a return on their enormous investment. While some additional construction of pumping facilities will be necessary, such construction is not expected to be at prohibitive cost, and no doubt will be planned as soon as present difficulties are corrected. Further, the President has recently stated that as one measure of coping with the deficit in U.S. balance of trade and payments he has instructed the Department of Energy (DOE) to "encourage an expansion of production at Prudhoe Bay above the 1.2 million barrels a day planned for early 1978." [11]

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[10] U.S. Department of Commerce, Maritime Administration, The U.S. Flag Tanker Fleet and Domestic Carriage Requirements—An Assessment of Fleet Adequacy, October 21, 1976.

[11] Release by Office of the White House Press Secretary via Department of Treasury, December 21, 1977.

In this light, TAPS deliveries from Prudhoe Bay as of early 1980 (1980.1) are projected for present purposes at 1.35 million b/d. This is not necessarily inconsistent with the Shell contention that TAPS flow cannot be increased above 1.2 million b/d through 1979 or 1980 because Shell recognizes the possibility that by the end of 1979 the throughput at TAPS will be above 1.2 million b/d.

There is no dispute among persons submitting comments that the production in South Alaska at Cook Inlet for the relevant time period will be 150,000 b/d. Therefore, it is found that the best estimate of total availability of Alaskan oil is 1.35 million b/d in 1978.2 or 3 (TAPS 1.2 and South Alaska .15) and 1.5 million b/d in 1980.1 (TAPS 1.35 and South Alaska .15).

(b) *West Coast Absorption*

There is no pipeline connecting the Alaskan oil pipelines to those of the continental United States. Hence, Alaskan oil is pumped principally at Valdez and Cook Inlet into tankers for shipment to the lower 48 states. For a variety of reasons only a limited amount of the Alaskan oil can be absorbed by the U.S. West Coast. There is presently no suitable West Coast Oil pipeline connecting into west to east oil pipelines. There has been considerable discussion about constructing a pipeline from San Pedro, California, to Midland, Texas, to tie in with Texas pipelines which feed throughout the rest of the mid and eastern United States, but no work on such a connecting pipeline has commenced. It would take two years to complete such a project,[12] after necessary Governmental approvals at the local, state and Federal levels.

In 1976 and early 1977 the Federal Energy Administration (FEA) and MarAd estimated that the amount of

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[12] *SOHIO WEST COAST TO MID-CONTINENT PIPELINE PROJECT.*

Alaskan oil that would be absorbed by the U.S. West Coast would be 850,000 b/d from 1978.2 through 1980.1. This estimate was based on generalized assumptions. Actual experience since TAPS opened shows less absorption of Alaskan oil than expected [13] and has resulted in revised estimates by the FEA, MarAd and private persons. The amount of the downward adjustment is in dispute.

The FEA indicated in Fall 1977 that only 600,000 to 700,000 b/d of Alaskan oil would be sold in 1978.3 to West Coast refiners. Seatrain indicates that there would be 675,000 b/d absorbed in 1978.3 and 750,000 b/d absorbed in 1980.1. Shell estimates that West Coast absorption will be 850,000 b/d in 1978.2 and 1980.1. Alaska Bulk and Trinidad indicate in their June 1976 study a West Coast absorption in 1978.3 of 600,000 to 700,000 b/d and in 1980.1 of 700,000 to 800,000 b/d.

The MarAd/Board have reviewed the principal factors expected to influence the absorption of Alaskan oil on the U.S. West Coast: the limited present and scheduled capacities of West Coast refineries; [14] the approximately three-year time interval required for refinery modification for high sulfur crude, as recognized by Shell; the relatively high sulfur content and specific gravity of Alaskan crude oil, compared to certain domestic and foreign imported oils, making it less attractive to existing West Coast refineries and requiring them to modify at high cost their facilities to handle large quantities of the oil; the sales price of Alaskan crude oil compared to Californian and foreign produced oils; [15] and the production and import levels of Californian and foreign oils, respectively.[16] Based on this review, the best current estimates are that in 1978.3 the U.S. West Coast will absorb 675,000 b/d and in 1980.1 only 680,000 b/d. In short, there is no support for an opinion that the West Coast can reasonably be expected to significantly increase its absorption beyond the 1978.3 level for the foreseeable future. Two recent developments provide further support for this conclusion: (i) the December 12, 1977 action of DOE amending its crude oil equalization (entitlement) program to encourage greater use of heavy Californian crude oil with expected displacement of Alaskan crude oil; and, (ii) recent instructions from the President to the DOE, (see footnote 11), to pursue efforts to expand production of oil at Elk Hills Naval Petroleum Reserve and to maintain production of Californian crude at a high level. [17]

[13] U.S. Coast Guard arrival and sailing cables from Valdez, Alaska.

[14] FEA, *Equitable Sharing of North Slope Crude Oil*, April 1977.

[15] Petroleum Intelligence Weekly.

(c) *Surplus via Panama*

The Alaskan oil that is not absorbed on the West Coast is expected to be shipped through the Panama Canal to the Gulf and East Coasts. Because it is generally cheaper to the shipper to transport oil by large size tankers and because of the physical limitations of the Panama Canal, there has developed the commercial practice of loading oil into large tankers in Alaska and discharging the oil into small tankers by means of lighterage

[16] FEA, *Equitable Sharing of North Slope Crude Oil*, April 1977.

[17] Shell argues that "in the long run" Alaskan oil will be absorbed to the maximum West Coast refinery limits because it is more profitable to sell such oil to the West Coast than to ship it through the Canal. It claims the present situation is due to SOHIO's committed tanker charters and claims others charge lower prices than SOHIO for Alaskan oil. However, it is understood that Exxon also was heavily committed to tanker charters in the trade, but was able to place excess tonnage through various market mechanisms. Further, Shell's explanation fails to take into account the many factors impacting on West Coast absorption of Alaskan oil and sheds little light on when is "the long run."

off Panama for further shipment through the Panama Canal to the Gulf and East Coasts. Based on the projection of Alaskan oil availability of 1.35 million b/d in 1978.3 and 1.5 million b/d in 1980.1 and West Coast absorptions of 675,000 b/d and 680,000 b/d respectively, it is determined that the expected surplus of Alaskan oil moving via the Panama Canal and onto the Gulf and East Coasts will be 675,000 b/d in 1978. 3 and 820,000 b/d in 1980.1.

(d) *Conversion Factor of B/D to DWT*

It is necessary to convert the demand of Alaskan oil in b/d to DWT since the supply of tankers is measured in DWT. Various assumptions have to be made, including the size and speed of vessels, the number of operating days and port time, and cargo deadweight versus design deadweight. The MarAd 1976 supply-demand analysis contained data which Seatrain uses to derive the following figures to convert b/d to tanker DWT requirements:

Valdez to West Coast	1.84
Valdez to Panama	4.45

Shell, and to a large extent Alaska Bulk and Trinidad, relies on the data underlying these figures.

Actual experience has indicated higher conversion factors. Based on this experience, Seatrain suggests conversion factors of 2.28 to the West Coast and 4.97 to Panama.

It is not found that actual experience under start-up conditions at reduced volumes is sufficient to justify the use of the Seatrain suggested factors. However, it is found from monitoring of the actual voyages in the Alaskan oil trade that there may be a shorter operating year than earlier expected (345 days instead of 350) for voyages from Alaska, slower average speed (15.5 knots

instead of 16 for large tankers and 15 instead of 16 for small tankers), less cargo per DWT (.94 instead of .96),[18] and fewer barrels per ton (7.184 instead of 7.4).[19] With these adjustments, due to better information from actual operation, the adjusted conversion factors are:

Valdez to West Coast	1.99
Valdez to Panama	4.84

(e) *Supply of Tankers*

The supply of unsubsidized domestic tanker tonnage at any given time for the Alaskan oil trade is the sum of the tonnage capacities of "available" tanker vessels in service and built without CDS. Because of the nature of the Alaskan oil trade with large tankers operating from Alaska to off Panama and small tankers operating through the Panama Canal to Gulf and East Coasts, this supply is calculated separately for large and small tankers. Small tankers are those that can transit the Panama Canal fully loaded, which are generally limited to a maximum of between 50,000 and 60,000 DWT.

The STUYVESANT at 225,000 DWT is clearly a large tanker. It is believed that large tankers, especially of the size of the STUYVESANT, in the Alaskan oil trade do not compete with small tankers because of different physical characteristics, operating areas and economies of scale. However, it is recognized that Alaska Bulk and Trinidad maintain that only the independent tanker owners (some with small tankers) are in competition with the STUYVESANT. In view of that contention the supply for large and small tankers has been calculated.

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[18] Prior MarAd estimates did not sufficiently account for bunkering patterns in the cargo per DWT figure.

[19] API gravity of North Slope Oil of 26° - 28°.

The Supply of domestic tankers has been adjusted for domestic coastwise trade and Military Sealift Command charters but not for domestic trade tankers in the Soviet grain and Strategic Petroleum Reserve (SPR) programs which may reduce the available supply for the Alaskan trade. With those adjustments the following supply of domestic unsubsidized tanker vessels (excluding the STUYVESANT) is found "available" to the Alaskan oil trade:[20]

1978.3	Small tankers	1,227,000 DWT
	Large tankers	3,758,000 DWT
	Total	4,985,000 DWT
1980.1	Small tankers	1,227,000 DWT
	Large tankers	4,548,000 DWT
	Total	5,775,000

(f) *Shortage or Surplus of Tankers in Alaskan Oil Trade*

Based on the foregoing, the demand for tanker vessels in the Alaskan oil trade in 1978.3 is derived as follows:

Large Tankers			
675,000 b/d West Coast	x 1.99	=	1,342,000 DWT
675,000 b/d Panama	x 4.84	=	3,267,000 DWT
Total			4,609,000 DWT
Small Tankers			
675,000 b/d Panama	x 1.95	=	1,313,000 DWT
Total			5,922,000 DWT

Based on a supply of 1,227,000 DWT for small tankers and 3,758,000 DWT for large tankers, there results a shortage of 86,000 DWT for small tankers and 851,000 DWT for large tankers. Such a shortage for large

[20] Shell projects a larger supply of small tankers by inclusion of tankers listed in the 1976 MarAd study under "Other Than Alaska Domestic Trade Tanker Fleet." Shell is incorrect as the supply tonnage in the study was accurate even though individual ships listed may have slipped into and out of the Alaskan and non-Alaskan trade.

tankers far exceeds the 225,000 DWT of the STUYVESANT and shows that the STUYVESANT cannot be expected to displace any unsubsidized vessels in its relevant market.

The demand in 1980.1 for tanker vessels in the Alaskan oil trade is derived as follows:

Large Tankers			
680,000 b/d West Coast	x 1.99	=	1,353,000 DWT
820,000 b/d Panama	x 4.84	=	3,968,000 DWT
Total			5,321,000 DWT
Small Tankers			
820,000 b/d Panama	x 1.95	=	1,596,000 DWT
Total			6,917,000 DWT

Based on a supply of 1,227,000 DWT for small tankers and 4,548,000 DWT for large tankers, there results a shortage of 369,000 DWT for small tankers and 773,000 DWT for large tankers. Again, since such shortage far exceeds the 225,000 DWT for the STUYVESANT, such vessel cannot be expected to displace any unsubsidized vessels.

This assessment of supply and demand is based on a number of variables that might change. Shell points out that foreign flag operators may carry substantial quantities of Alaskan oil to the Virgin Islands, but it does not include any allowance for this contingency in its calculations of the supply and demand for Alaskan oil trade. The subject of such foreign flag carriage is presently a matter of litigation.[21] Possible factors which might reduce the supply of unsubsidized vessels for Alaskan oil carriage include the use of tankers in the SPR and Soviet grain programs; some 30 relatively large vessels

[21] The matter is on appeal to the U.S. Court of Appeals for the District of Columbia (Civ. No. 77-1934, -1962, and -1970) from the September 19, 1977 District Court decision in *American Maritime Association* v. *Blumenthal*, Civ. Action 77-1508 (D.D.C. 1977).

transiting the Panama Canal at reduced carge deadweight satisfy any shortage in the supply of small vessels; implementation of more stringent U.S. Coast Guard pollution control regulations concerning segregated ballast on tanker vessels; and the increased production at Elk Hills beyond 150,000 b/d which is a strong possibility in view of the President's instruction to expand such production.[22]

These uncertainties as well as the uncertainty over the timing of construction of new West Coast pipelines make it difficult or impossible to predict the supply and demand of tankers in the Alaska oil trade beyond 1980, when the present time charter of the STUYVESANT expires. The 1976 MarAd study indicated that Alaskan oil production could increase to 1,825,000 b/d in 1982.4 and to 2,150,000 b/d by 1985. While there undoubtedly will be one or more pipelines constructed on the West Coast in the next tewenty years, there also may be additional discoveries in Alaska which would offset the decline in demand for tankers. The owners of the STUYVESANT have not indicated that the vessel is permanently dedicated to the Alaskan oil trade. Even if it were, there is no substantial basis known on which to conclude that there would be any unfair competition through displacement of any unsubsidized vessels that may be in that trade in the future.

2. *Charter Rates and Rates of Return*

Several persons submitting comments argue that the employment of the STUYVESANT would adversely affect charter rates and rates of return in the Alaskan oil trade by unsubsidized operators. The argument is based largely on a perceived surplus of tonnage for the Alaskan trade which the STUYVESANT employment in the trade would worsen. As is found herein, it is expected that

[22] See note 11 *supra*.

there will be a tonnage shortage and not a surplus in the Alaskan oil trade even after including the STUYVESANT.

Shell presses further that *any* new vessel employment in the Alaskan oil trade adversely affects the charter rates of other vessels to some extent. However, it is not established that Shell's theory comports with the charter market which has developed. Equally important, Shell's premise that any additional competition is unfair competition was rejected by the District Court and is not supported by the Act.[23]

Alaska Bulk and Trinidad add that the STUYVESANT charter at $4.50 per DWT per month is a depressed rate from the norm of $8.00 to $9.00 and amounts to unfair competition. The vessels of Alaska Bulk and Trinidad were chartered before the STUYVESANT so their concern is limited to possible rechartering during and after 1980. In a freely functioning market charter rates are less per DWT for larger vessels than small vessels because of economies of scale, all else being equal. The STUYVESANT charter rate fixed on June 21, 1977, was $5.40 per DWT per month (contrary to the assertion of Alaska Bulk and Trinidad). Some smaller vessels of the independent unsubsidized tanker owners in the Alaskan oil trade have been fixed from $8.00 to $9.00 per DWT per month, and some at higher and lower rates. The projected market for transportation of Alaskan oil indicates that because demand will exceed supply shippers will in

[23] The District Court found that "Plaintiffs have no 'legitimate claim of entitlement' to be free from competition," citing cf. *Board of Regents* v. *Roth*, 408 U.S. 564, § 577 (1972). Memorandum Opinion at 19. It further found "that the protection of unsubsidized vessels from the 'unfair' competition of subsidized vessels is one of the cornerstones of the statutory schemes." Memorandum Opinion at 24. The Act does not absolutely bar even CDS vessels from domestic operation.

the usual circumstance have to pay at least a compensatory rate for the needed tonnage. The level of compensatory rate and fair rate of return are matters dependent on a company's operating and financing cost structure, including such factors as age, depreciation and initial capitalized cost of the vessels. Based on the information presented there is nothing to suggest that Alaska Bulk and Trinidad will not be able to recharter their vessels at reasonable levels.[24]

Only one person submitting comments detailed a particular instance of alleged unfair competition from the STUYVESANT charter rate fixture. American Petrofina maintained that on June 29, 1977, it offered the 225,000 DWT BROOKLYN or WILLIAMSBURG (sisterships to the STUYVESANT and built with CDS) to SOHIO for six months at a rate of $7.00 per DWT per month and that the offer was rejected. Even if unsubsidized operators are entitled to a certain level of protection from competition by formerly CDS vessels, operators of CDS vessels are not entitled to such protection,

[24] It should be also noted that on November 20, 1977, MarAd approved the application for Title XI guaranteed financing on the PRINCE WILLIAM SOUND, a 120,000 DWT tanker in the amount of $42,850,000. The PRINCE WILLIAM SOUND is owned by 667 Leasing Company and is bareboat chartered to Alaska Bulk for a term 20 years under a "hell and highwater" charter. The terms of the Title XI financing on the PRINCE WILLIAM SOUND are similar to those of the STUYVESANT. The Title XI guaranteed bonds on the PRINCE WILLIAM SOUND will be amortized on a level debt service basis with a maturity of 20 years from date of delivery of the vessel (the same as the STUYVESANT). In making the statutory funding of economic soundness for the PRINCE WILLIAM SOUND as required by Section 1104 (d) of the Act, MarAd relied in part on submissions from the Title XI applicant that there was a long term need for this vessel in the domestic commerce of the United States. MarAd's own analyses, which took into consideration the impact of the STUYVESANT being operated in the coastwise trade, confirmed that there was a long term need for the PRINCE WILLIAM SOUND in the Jones Act trade and the statutory finding of economic soundness was made on this basis.

at least to the same extent. If CDS operators are to participate in the Alaska trade, they have to compete for charters in the market. Further, since there is a market for transportation of Alaskan oil sufficient for American Petrofina's vessel the presence of the STUYVESANT would have no effect on this market.

3. *New Construction*

American Waterways, Alaska Bulk and Trinidad, among others, contend that the STUYVESANT actions create uncertainty among domestic operators and investors in deciding on orders for new construction and will probably result and has resulted in no more commitments for new unsubsidized ships. They cite neither a particular instance of a decision not to build new ships in the domestic trade nor any plan to build which was scrapped.

There was a significant period before the STUYVESANT actions when there were no new domestic orders placed. The last order for ships to be constructed for operation in the Alaskan oil trade was in 1974. Thereafter, there was a worldwide depression in the tanker market. It is unlikely then that the STUYVESANT actions have any relationship to the lack of new shipbuilding orders for the domestic trade either in the past or in the future. This conclusion is further strengthened by the findings herein that the market could accommodate some additional tonnage.

4. *Inherently Unfair*

Several persons submitting comments, particularly Shell, Alaska Bulk, Trinidad and Crowley, contend that the STUYVESANT actions were "inherently" unfair. They cite no adverse competitive effect but allege unfair competition because without repayment of CDS the STUYVESANT would not be in the trade, without the STUY-

VESANT the domestic trade would be well balanced, and with the STUYVESANT actions, ships could be built on speculation under the CDS programs and switched to the domestic trade. The contentions challenge the authority of the Board to permit full CDS repayment, but that authority has been affirmed by the District Court and is not for discussion herein. The contentions also assume that domestic operators have absolute protection from any additional competition, which the District Court also rejected. Finally, the contentions assume that the domestic trade market could not accommodate the STUYVESANT without significant adverse effect to domestic operators. That assumption has been rejected in the preceding discussion.

5. *Loss of Jobs*

The AFL-CIO Maritime Committee alleges that the impact of the STUYVESANT actions on its "client" would be termination of employment of its members. The reference is apparently addressed to the lack of a charter in the Alaskan oil trade on Shell's two large tankers being constructed. As Seatrain points out, there is no relationship between the STUYVESANT charters and Shell's lack of charters because Shell failed to make its ships available for charter until after the STUYVESANT charter was negotiated and public knowledge and further because Shell was seeking significantly higher rates than market competitive rates for U.S. coastwise qualified vessels. Moreover, the MarAd/Board actions assured that the STUYVESANT would not be in layup and thus generated additional union employment rather than any decrease.

6. *No Fair Warning*

American Waterways complains that the STUYVESANT actions were taken without "fair warning" to domestic operators of the domestic tanker tonnage available.

The "fair warning," if any, afforded domestic operators by law and the actual notice given domestic operators were subjects of litigation in court. The subjects are not for discussion in this decision. Even if there were a lack of fair warning, which is not the situation, the adverse competitive consequence must be encompassed in the preceding discussions of alleged adverse competitive effects.

B. *Competitive Effect—Repayment by Promissory Note*

Those submitting comments adverse to the STUYVESANT actions argue that acceptance of repayment of CDS by a 20-year promissory note rather than immediate cash payment in full gave the STUYVESANT two unfair competitive advantages. The first unfair advantage was a "small loan" not available to domestic operators and the second was a lower charter rate.

1. *Small Loan Advantage*

Alaska Bulk, Trinidad and others contend that permitting Polk to repay CDS by a 20-year promissory note is in reality a loan which bears an interest rate equal to the interest rate borne by other Title XI financing for the STUYVESANT and that such loans are not available to ships in the domestic trade.

Under Title XI of the Act the Secretary is authorized to provide loan guarantees for financing of U.S.-built vessels. If ships are built without the aid of CDS, a domestic trade shipowner may secure financing under Section 1104(b)(2) of the Act not to exceed 87½% of the actual costs of the vessels with Title XI bonds to be repaid within 25 years from date of delivery of the vessels. Under the same provision if vessels are built with the aid of CDS, Title XI financing may not exceed 75% of the actual costs of the vessels.

The STUYVESANT was contracted to be built with the aid of CDS and as such was limited to 75% Title XI financing. The subsequent actions permitting the STUYVESANT to repay CDS by promissory note also made the STUYVESANT eligible for 87½% Title XI financing. Since the entire amount for the CDS repayment would represent actual cost of the STUYVESANT and be eligible for Title XI financing, the combined package (of the 20-year promissory note in the amount of $27.2 million and Title XI financing in the amount of $60.2 million) provides no more long term debt financing than an 87½% Title XI financing in the total amount of $87.4 million for which the STUYVESANT was also eligible. Therefore, there is no competitive advantage in terms of financing.

2. *Charter Rate*

The remaining question is whether the cost of repayment by promissory note gives a significant competitive advantage so as to permit a lower charter rate than obtainable from immediate full repayment. If Polk had been required to make immediate full repayment, it would have in all probability obtained Title XI refinancing of the CDS under Section 1104(a)(3). This section provides for "financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended . . . ." The two methods can be compared in terms of cash flow differential and converted to a cost per DWT per month for charter rate purposes.

The cash flow differential was properly set forth in an affidavit in court litigation.[25] The interest rate as of the

[25] Affidavit of Edmond J. Fitzgerald, Acting Director, Office of Ship Financing Guarantees, Maritime Administration, dated October 18, 1977.

STUYVESANT closing would have been 8.05% on Title XI guaranteed bonds and the guarantee fee would have been ¾ of 1%. The total rate of Title XI financing on that date would have been 8.80%, resulting in approximately annual payments of principal and interest on the CDS amount on a level debt service basis of $2,914,700 over 20 years. This is compared to the approximately equal payments of principal and interest under the promissory note on the CDS rate of $2,738,300 annually. The difference between the two payments is only $176,400 per year. About $155,655 of the difference would represent the ¾ of 1% guarantee fee. The remaining $20,745 would represent the timing difference of financing at a Title XI bond rate of 7.95% in early September and the rate of 8.05% for Title XI financing that would have been required on September 30, 1977 and is irrelevant to the consideration of competitive advantage.[26]

When the $155,655 difference attributable to the ¾ of 1% guarantee fee is reduced to a monthly charter hire cost, it equates to $.06 per DWT per month for the STUYVESANT. This increased cost of the vessel would affect the charter rate only if the increase was so large that the time charter rate could not generate sufficient funds to support the debt service and operating costs. The time charter rate on the STUYVESANT is $5.40 per DWT per month. The bareboat charter hire on the STUYVESANT is approximately $3.54/DWT/month (in-

[26] The $20,745 differential is irrelevant because in comparing financing by promissory note and Title XI, the same dates for interest rates must be compared. The promissory note runs from the time of ship delivery (September 30, 1977) but the interest rate for the note was set at the time of the second tier Title XI financing on September 9, 1977. It must therefore be assumed that a comparable Title XI financing on the CDS repayment would have been arranged at the same time as the second tier Title XI financing on September 9, 1977 and have received the identical interest rate of 7.95%.

cluding full coverage of debt service) and the operating costs are approximately $1.60/DWT/month. There is accordingly a profit of $0.26/DWT/month which would be lessened by the $.06 increase in vessel cost. The different financing of the CDS repayment therefore would not lead to a different charter rate and would have no competitive impact on the Alaska oil trade. Further, as Seatrain points out, to the extent the leading protestants to the STUYVESANT actions have a better credit rating, they could command a better interest rate in financing a ship comparable to the STUYVESANT which would more than offset the $.06 increase in vessel cost.[27]

C. *Competitive Effect—No Interest During Construction*

Alaska Bulk and Trinidad estimate the lack of a charge to Polk for interest on the CDS repayment for the time period during construction [28] saved Seatrain $5.2 million. Seatrain computes the savings at $6.7 million. Alaska Bulk and others contend that the savings gave Polk a cost advantage not enjoyed by unsubsidized owners in the Alaskan oil trade.

The District Court at least implicitly found that in appropriate instances the Secretary could accept repayment of CDS by promissory note without interest charged

[27] Alaska Bulk and Trinidad contend that Polk by repaying with a promissory note also saved the costs of underwriter's fees of $250,000 by not having to sell Title XI bonds. Even accepting the contention, it would add less than a cent to the $.06 increase in vessel cost due to the guarantee fee and therefore has no practical effect.

[28] For clarification, it is noted that although the Board did not require *retroactive* interest on the CDS repayment, which would have covered the construction period of the STUYVESANT until delivery, the Board did require prospective interest to be paid on the unamortized balance of the 20 year promissory note at an interest rate of 7.95%.

during the construction period.[29] It should be noted that there is no specific requirement of Section 506 of the Act that CDS be repaid with interest when domestic operation is permitted for up to six months each year upon pro-rata repayment. Also, in the past, there has been no interest charged on repayment of interest by subsidized liner carriers operating in domestic service under Section 506. It would be inconsistent then for the Secretary to be required to charge a construction period interest for a total repayment of CDS permitting permanent domestic operations. Furthermore, during Congressional consideration of the original House and Senate versions of the Act there was a provision for payback of CDS with interest because certain sponsors of the bills felt that otherwise the operator in effect was being afforded the benefits of an interest free loan.[30] The interest provisions were dropped without explanation. It is fair to conclude that Congress did not intend that interest be required to be paid on CDS repayments. By contrast, in Section 607 dealing with the Capital Construction Fund there is a specific requirement for payment of interest under certain circumstances dealing with nonqualified withdrawals. Thus, if Congress had intended that CDS must be re-

[29] With respect to the Secretary's authority to accept repayment of CDS by promissory note on any terms including without construction period interest, the Court held: "In view of the Secretary's broad contractual authority which all parties agree extends to appropriate CDS repayment transactions, and the Court's previous conclusion that it would be patently inconsistent with the far-reaching nature of the Act's statutory scheme to interpret the Secretary's authority in an unnecessarily restrictive manner, the Court finds that it would be entirely inappropriate at this stage of the litigation for the Court to accept plaintiff's contention that no form of promissory note can legally be accepted by the Secretary as repayment for CDS." Memorandum Opinion at 17-18.

[30] Original House Bill H.R. 7521; S-2582 as reported May 24, 1935; H.R. 8555 as reported June 19, 1935.

paid with interest, it would have kept an interest clause in the final version of the bill.[31]

The remaining question is whether in this instance, as a matter of sound exercise of discretion, the Secretary should have required repayment with construction period interest so as to mitigate any cost advantage to Polk. In fact, Polk received no cost advantage from the lack of such interest charge because the interest assessment would not have affected the sale price of the vessel or the cost of debt service.

It is calculated that the amount of interest relating to the construction period for the CDS on the STUYVESANT would have amounted to $5,147,758 based on the same formula used in calculating interest for payback of CDS on two LNG vessels under entirely different circumstances.[32] If the Board had required an interest payment on the CDS repayment of the STUYVESANT, the interest assessment would have raised the amount of CDS repayment from $27.2 million to $32.3 million. The additional debt would not have affected the purchase price, for, as Seatrain points out, GECC would have insisted on both the $120 million purchase price and the debt/equity ratio of $87.4 million/$32.6 million in order to assure its advantages from the sale. Further, because the bareboat hire rate is a product of the vessels' sale price and debt/equity ratio, it too would not have been affected

[31] Opinion of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964). *States Steamship Co.—Calls at Hawaii*, 5 SRR 1111, 1135 (SOC 1965).

[32] On August 9, 1977, the Board permitted Wilmington Trust Company to repay CDS on two Eascogas LNG vessels so as to enable them to be free of Section 506 requirements and to operate permanently in the foreign-to-foreign trade. The Board determined that because the United States would not receive the benefit of operation of the vessels in actual U.S. commence that an interest charge was appropriate. The STUYVESANT is expected to operate in U.S. commerce.

by an interest assessment. Therefore, as related to vessel cost, the debt to be serviced and the bareboat charter hire for the STUYVESANT, the result would have been the same with or without the CDS interest assessment.

This effect of the interest assessment is calculated as follows. In the actions approving the sale of the STUYVESANT and CDS repayment, a second tier of Title XI financing was approved at a level of $31.4 million. If the same debt/equity ratio were maintained with a $120 million sale price and interest charged on the CDS repayment, the amount of the second tier of Title XI would have been reduced by the $5.1 million interest on the CDS repayment. Since the interest rate on the CDS note was pegged at the Title XI rate for the second tier of Title XI bonds or 7.95%, the practical effect on the debt service is zero, as shown by the following table:

Table

Effect of Assessing Interest on CDS Funds
($ millions)

	Actual	Assess Interest
Title XI 1st	$ 28.8	$ 28.8
Title XI 2d	31.4	26.3
CDS Note	27.2	32.3
Total Debt	$ 87.4	$ 87.4
Equity	32.6	32.6
	$120.0	$120.0
$/DWT/Mo.	$ 3.54	$ 3.54

Under the existing arrangement the second tier of Title XI financing amounted to $31.4 million, of which $28.6 million was used by Seatrain to repay part of the $40 million EDA guaranteed loan. If MarAd had assessed the interest charge Seatrain would have been out of pocket $5.1 million from the reduced proceeds of the second tier of Title XI and the EDA would have received $23.5 million in payment of its guaranteed loan instead

of $28.6 million. The beneficiaries of the absence of an interest assessment are not the STUYVESANT or its owners or charterers but the shipyard and most directly the Government and the taxpayers. The requirement of a $5.1 million interest assessment would then have no effect on competition in the Alaska oil trade.

D. *Non-Competitive Impact Issues*

Persons submitting comments also "touch upon (i) the precedential effect of the STUYVESANT actions, (ii) the authority of the MarAd/Board to permit full CDS repayment with a promissory note and without construction period interest, and (iii) the proper procedure for deciding the competitive effect of the STUYVESANT actions.

1. *Precedent of STUYVESANT Actions*

Many persons submitting comments express fear or hope that the STUYVESANT actions will be precedent for similar actions in the future. IOT and Apex request guidance as to when others might benefit from the STUYVESANT actions. American Petrofina expresses concern that similar actions will be taken with respect to the sistership BAY RIDGE. Crowley and the AFL-CIO Maritime Committee, among others, fear that such repayment and domestic operations will become common practice in the future. Matson seeks a statement that the Board's decision will be limited to the STUYVESANT and not liner operations.

The STUYVESANT actions were undertaken in view of very special circumstances as recognized by the District Court. The present decision is limited to the STUYVESANT and will not be precedent for approval of full CDS repayment of other vessels for operation in the Alaska oil trade. Proposed regulations are being developed and will soon be published in accordance with the suggestion of the District Court.

2. *Authority for STUYVESANT Actions*

Several adverse comments submitted either explicitly or implicitly challenge the authority of MarAd/Board to take the STUYVESANT actions. For instance, Alaska Bulk and Trinidad argue that the most serious effect of the STUYVESANT actions on ship operators in the Alaskan oil trade is "the breaking of rules."

The present decision is predicated on the authority of the MarAd/Board to permit full repayment of CDS with a 20-year promissory note and without interest as found by the District Court. Any discussion on this authority is neither necessary nor appropriate since it is the subject of appeal before the U.S. Court of Appeals for the District of Columbia.

3. *Proper Procedures*

Shell, joined by certain others, argues that the Administrative Procedure Act (APA),[33] District Court, and the Act require a trial type hearing for resolution of the issue of the competitive effect of the STUYVESANT decisions, and that if such hearing is not required it should be held as a matter of discretion. Alternatively, Shell argues there must be greater opportunity to participate in the decision in order to allow for effective judicial review.

As Shell concedes, there is no statutory requirement for a hearing in the matter of repayment of CDS under Section 506 of the Act. Its argument of analogy to Section 805(a) and other provisions of the Act only demonstrates that Congress expressly required a hearing (whether it

[33] 5 USC § 551 *et seq.* (1970).

be trial type or less formal) when it so intended. Since the 1936 Act requires no hearing, neither does the APA.[34]

While the MarAd/Board could order a hearing in this instance or permit additional procedural process, the time limitations imposed by the Court, which clearly did not require a hearing [35] and the degree to which the matter had been discussed in the course of court litigation, leads to the conclusion that no trial-type hearing or additional procedural process is desirable. The issues have been well framed from the comments received, a record was made, and a prompt decision is being rendered.

IV. CONCLUSION

For the foregoing reasons it is found and concluded with respect to the Memorandum Opinion and Order issued November 22, 1977, by the United States District Court for the District of Columbia in *Shell Oil Company* v. *Kreps*, (CA-77-1645) and *Alaska Bulk Carriers, Inc. and Trinidad Corporation* v. *Kreps* (CA-77-1647) and to the comments received pursuant to Federal Register notice of December 6, 1977, concerning repayment of CDS on the STUYVESANT and its operation in the Jones Act trade:

1. That the effect on competition of permitting the STUYVESANT to engage in the Alaskan oil trade is none or minimal.
2. That the adverse effect on competition of permitting Polk to repay the STUYVESANT's CDS with a 20-year promissory note rather than requiring immediate payment in full is minimal.
3. That the effect on competition of permitting Polk to repay the STUYVESANT's CDS without requiring payment of an interest assessment for the period since the CDS had been paid to Seatrain is none.
4. That no further consideration of the previous MarAd/Board STUYVESANT actions is necessary as such actions remain unchanged.

[34] E.g., *Local 282 Int'l Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795 (2d Cir. 1964).

[35] The Memorandum Opinion and Order does not specify a hearing and in the Status Conference on November 30, 1977, the Judge refused the request of counsel for Shell that the Court delineate precisely the procedure to be followed in the administrative reconsideration.

SO ORDERED BY THE
ASSISTANT SECRETARY FOR
MARITIME AFFAIRS AND THE
MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATION

Dated January 6, 1978

/s/ Robert J. Patton, Jr.
ROBERT J. PATTON, JR.
Assistant Secretary
Maritime Subsidy Board
Maritime Administration

[Footnotes 32-35 correctly renumbered in printing.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed March 22, 1979]

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, Secretary of Commerce,
U.S. Department of Commerce, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

BEFORE: Bazelon, McGowan, and Wilkey, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), it is

ORDERED, by the Court, that the aforesaid petitions for rehearing are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the petitions for rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed March 22, 1979]

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, Secretary of Commerce,
U.S. Department of Commerce, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

Upon consideration of the suggestions for rehearing *en banc* filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), having been transmitted to the full Court and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed April 3, 1979]

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, Secretary of Commerce,
U.S. Department of Commerce, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestions for rehearing *en banc*, filed by appellees/cross appellants (Seatrain Shipbuilding Corp., et al.) and appellees (federal), having been transmitted to the full Court and a majority of the judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that the aforesaid suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Bazelon would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1978

[Filed April 19, 1979]

No. 77-2080

ALASKA BULK CARRIERS, INC.
TRINIDAD CORPORATION, APPELLANTS

v.

JUANITA M. KREPS, Secretary of Commerce,
U.S. Department of Commerce, ET AL.

And Consolidated Case Nos. 78-1211, 78-1212 and 78-1281

BEFORE: Bazelon, McGowan, and Wilkey; Circuit Judges

ORDER

Upon consideration of the motions for stay of mandate pending application for writ of certiorari, filed by appellees' (federal) and cross-appellants (Seatrain Shipbuilding Corp. and Polk Tanker Corp.) and of the opposition filed to the above referenced motions, it is

ORDERED, by the Court, that the motions for stay of mandate pending application for writ of certiorari are granted and the Clerk is directed not to issue the mandate in these consolidated cases prior to May 1, 1979.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

SUPREME COURT OF THE UNITED STATES

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
Petitioners

v.

SHELL OIL CORPORATION, ET AL.

ORDER ALLOWING CERTIORARI. Filed June 18, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Supreme Court, U.S.
FILED
MAY 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

AND

POLK TANKER CORPORATION

Petitioners,

v.

SHELL OIL COMPANY, *et al.*

Respondents.

BRIEF OF SHELL OIL COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the Secretary of Commerce have authority to waive permanently restrictions required by the Merchant Marine Act, 1936, as amended, against use in domestic trade of a vessel built with construction-differential subsidy when the Act not only requires such vessels to engage exclusively in foreign trade but expressly limits the Secretary's authority to waive domestic trade restrictions to periods of no more than six months in any year?

STATEMENT OF THE CASE

This case presents the second instance in fifteen years in which a vessel which had received construction differential subsidy has actually entered the domestic trade by reason of a purported waiver by the Secretary of Commerce, and the first instance since the Merchant Marine Act in 1936 in which the vessel had been built with construction differential subsidy. It arose in the following manner.

By letter dated August 31, 1977, defendant Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs ("Assistant Secretary") and defendants Howard F. Casey and Samuel B. Nemirow, members of the Maritime Subsidy Board ("MSB") ruled that the T.T. STUYVESANT ("STUYVESANT"), a 225,000 deadweight ton ("dwt") oil tanker could be operated in the domestic trade without limitation, provided that construction differential subsidy ("CDS") be repaid over 20 years. The Assistant Secretary and MSB members took these actions as delegatees of defendant Juanita M. Kreps, Secretary of Commerce ("Secretary").

Prior to defendants' actions, the STUYVESANT was barred from domestic trade because it was built with the aid of CDS. By statute, CDS may be paid only for the

construction of vessels to be used in the United States foreign trade, and owners of vessels built with CDS must agree to restrict trade activity accordingly. Merchant Marine Act, 1936, §§ 501, 506, 46 U.S.C. §§ 1151, 1156. The funds represent the approximate cost differential between building a ship in the United States and abroad, thus compensating for the competitive advantage enjoyed by foreign-built vessels. Merchant Marine Act, 1936, § 502, 46 U.S.C. § 1152. Since United States domestic trade is restricted to vessels built in the United States, no CDS is necessary or available for vessels engaging in this trade. Merchant Marine Act, 1920 ("Jones Act") § 27, 46 U.S.C. § 883.

The CDS funds were paid pursuant to an agreement of June 20, 1972, between MSB and Seatrain Shipbuilding Corporation ("Seatrain"), the builder of the STUYVESANT. On the same date, Polk Tanker Corporation ("Polk"), as the vessel purchaser, agreed to operate the STUYVESANT exclusively in the United States foreign trade. Polk and Seatrain were building the STUYVESANT on speculation. No potential charterer was committed to the vessel in 1972.

On July 8, 1977, as the vessel neared completion, Polk filed with MSB a request that the domestic trade restrictions of sections 501 and 506 be waived with respect to the STUYVESANT for a period of three years, provided a pro rata portion of CDS was repaid. The request stated that if a waiver were granted, the STUYVESANT would be chartered to the SOHIO Petroleum Corporation ("SOHIO") for use in the Alaska oil trade. The sole statutory authority for the waiver alleged in the request was section 207 of the Act, 46 U.S.C. § 1117.

The MSB, by published notice, opened Docket S-565 for the Polk request and invited public comment. 42 Fed. Reg. 37229 (1977). At that time, Shell Oil Company

("Shell") was the purchaser under a construction contract entered into on February 28, 1975 of two 188,500 dwt San Diego Class Tankers being constructed by National Steel and Shipbuilding Company, San Diego, California ("NASSCO"). Both vessels were to be built without government subsidies or financing aids. The approximate cost of each vessel was to be $92,000,000. The first vessel was scheduled for delivery in early 1978 and the second vessel in September, 1978.[1] On August 8, 1977, Shell among others filed comments indicating that the Polk request was beyond the lawful authority of the MSB and that Shell's interests could be seriously harmed if the request were granted.

On August 25, 1977, in correspondence not served on Shell or any other party to Docket S-565, Polk requested a permanent waiver for the STUYVESANT, coupled with a repayment of CDS over twenty years. As before, if the waiver were granted, the vessel would be chartered to SOHIO for three years. Polk withdrew the prior request for a three year waiver on August 26, 1977. MSB, in the letters of August 31, informed Polk that the August 25 request would be granted. The letters were, like the request, not served on Shell or published in the Federal Register.

Following issuance of the August 31 letters, a closing transaction at which the STUYVESANT would be sold and the new Title XI guaranteed bonds would be issued was scheduled for September 23, 1977. On September 12, 1977, Shell filed a request for review by the Secretary of Commerce. On September 22, 1977, no response having been heard from the Secretary, Shell filed a civil action in the United States District Court for the District of Columbia seeking review of the August 31 actions. The same

[1] The first vessel was delivered on March 14, 1978. The second vessel was delivered on October 25, 1978.

day, Judge Oliver Gasch of the United States District Court temporarily restrained the Board and Assistant Secretary from participating in the closing. *Shell Oil Co. v. Kreps*, No. 77-1645 (Temporary Restraining Order) (D.D.C. Sept. 22, 1977). The restraining order was dissolved by Judge Charles R. Richey on September 30, 1977. Judge Richey stated that Shell would not suffer irreparable harm until the first NASSCO vessel was delivered. *Shell Oil Co. v. Kreps*, No. 77-1645 (Findings of Fact and Conclusions of Law) (D.D.C. Sept. 30, 1977).

In an order and memorandum opinion of November 22, 1977, adjudicating cross-motions for summary judgment, the District Court held that the Secretary had authority to waive trading restrictions and to accept promissory notes but could only take such action insofar as it did not result in unfair competition to the unsubsidized fleet. Because the Secretary did not consider the competitive effects of the August 31 actions, the court held the actions to be arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The court remanded the matter to the agency for consideration of competitive effects.[2] *Shell Oil Co. v. Kreps*, 445 F. Supp. 1128 (D.D.C. 1977) (App. A at 65a-95a).[3]

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[2] On January 6, 1978, the MSB, after receiving written submissions on the question of competitive effect and denying Shell's request for a trial-type hearing, concluded that the August 31, 1977 actions were valid. *T. T. STUYVESANT—Repayment of CDS, Operations in Jones Act Trade*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. of Comm. 1978). Shell timely requested Secretarial review of the MSB Order, but such review was declined. On October 14, 1978, Shell filed in United States District Court a complaint challenging the validity of the MSB Order. Following the Court of Appeals decision in the proceeding now before this Court, the October 14 action was dismissed without prejudice.

[3] Citations to "App. A" refer to Appendix A of the Petition for Certiorari.

The United States Court of Appeals for the District of Columbia Circuit reversed the District Court on February 6, 1979. The panel majority held that the Secretary had no authority to waive permanently trading restrictions on vessels built with CDS. *Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d ____ (D.C. Cir. 1979) (App. A at 1a-51a). On March 22, 1979, the full court denied appellees' suggestions for rehearing *en banc*, with only one judge noting a dissent. (App. A at 63a-64a).

Shell caused the two NASSCO vessels to be built for the purpose of engaging in the Alaska oil trade. Prior to executing the construction contracts, Shell projected that either the ships would be needed by Shell to transport Alaskan crude to its own refineries or that, due to a shortfall in available unsubsidized vessel tonnage, other oil companies owning Alaskan crude would need the vessels. There is no trade other than the Alaska oil trade in which the vessels can economically be used. In other domestic trades, there is no demand for oil tankers of the size of the NASSCO vessels. The vessels cannot be used economically in the foreign trade because they were not built with subsidy.

The first NASSCO vessel was, upon delivery, chartered for two years to SOHIO. The two year period ends in March, 1980. At SOHIO's option, the contract may be extended for an additional 12 months. This option must be exercised no later than six months before the termination of the original term, or October, 1979. The second NASSCO vessel was also chartered to SOHIO upon delivery. This contract expires in October, 1981.

On March 28, 1979, Seatrain and Polk moved the Court of Appeals for a stay of mandate pending application to this Court for a writ of certiorari. On April 4, 1979, Shell objected to the stay and particularly to a stay in excess of seven days on the ground that a delay in the

filing of a petition for writ of certiorari until the allowable due date would prevent this Court from ruling on the petition until the next Term. Such delay, in turn, would have seriously prejudiced Shell, since it would have allowed the STUYVESANT to continue in the Alaska oil trade through the time the SOHIO option to renew must be exercised and negotiated.

On April 19, 1979, the Court of Appeals granted a stay of mandate pending application for writ of certiorari limited to May 1, 1979.

THE WRIT SHOULD NOT BE GRANTED

This case does not present an issue worthy of review by this Court. Although the narrow legal question decided below is one of first impression, its resolution depends on the simple application of long established doctrines of statutory construction. Judge Wilkey's well-reasoned, exhaustive opinion more than adequately settles the matter and should not be disturbed.

Moreover, the decision will have but a minimal impact on the interests of the United States. With respect to general maritime policy, the question involved in this case has arisen but one other time in the entire history of the Merchant Marine Act, 1936. With respect to the specific transaction involved here, the decision will have little impact on the United States' financial interests.

A. The Court of Appeals Correctly Held That the Secretary Has No Authority To Waive Permanently Trading Restrictions on Vessels Built with CDS.

This case can be easily decided by simply reading the Merchant Marine Act, 1936, ("the Act") as written and applying traditional rules of statutory construction. As petitioners concede, no provision of the Merchant Marine

Act, 1936, expressly authorizes the Secretary to waive permanently trading restrictions on vessels built with CDS. *See Petition For a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit* ("Seatrain Petition"), at 12. The sole provision in the Act dealing with the subject of waivers is section 506. 46 U.S.C. § 1156. This provision creates an exception to the general rule restricting vessels built with CDS to foreign trade by authorizing the Secretary to waive the restrictions for a maximum of six months in any one year. Fundamental precepts of statutory construction— recognized by the Court of Appeals—dictate that courts not create by implication exceptions to statutory requirements when Congress itself expressly enumerates one or more exceptions. *Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 15a-16a). The conclusion, thus, is inescapable that the Act nowhere authorizes permanent waivers and that section 506 prohibits them.

Any doubt that the Act prohibits permanent waivers is resolved by the legislative history of section 506. The initial proposals for the Act and the first drafts of section 506 clearly provided for permanent waivers upon full repayment of subsidy. The version of section 506 enacted in 1936 was ambiguous on the subject, although certain language appeared to authorize permanent waivers. In 1938, the only language arguably permitting permanent waivers was deleted, never to return. The statements of Maritime Commission Chairman Kennedy, who proposed the amendment, and the legislative reports accompanying the amendment make clear that the section was rewritten precisely to remove all ambiguities with respect to permanent waivers. This history teaches two lessons. One, section 506 was, from the outset, intended to describe all, not just some, instances of permissible waivers. Two, section 506 intentionally excludes permanent waivers from the category of permissible waivers.

The entire matter is summarized with great facility by the Court of Appeals:

> No one in the present case . . . now contends that § 506, as amended, authorizes permanent waivers. The trial court specifically so stated, and looked elsewhere in the statute for inherent authority in the Secretary to do this. However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.
>
> As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in 1938 determined, on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize.

Alaska Bulk Carriers, Inc. v. Kreps, ____ F.2d at ____ (App. A at 28a-29a) (emphasis in original; footnotes omitted).

Not only is the Court of Appeals' opinion supported by the language of the Act and its legislative history, but sound maritime policy requires the prohibition of permanent waivers as well. The Court of Appeals recognized—and properly so—that the Secretary is simply incapable of making judgments crucial to the intelligent exercise of the discretion she seeks in this case. The Secretary, by her own admission, cannot assess the competitive impact a new vessel will have on the domestic trade for more than three years. Once restrictions are waived, however, the vessel is free to ply the domestic trade for its full 20 year useful life. The unknown consequences of this new and previously unanticipated competitive entry speak strongly against permanent waivers. *See Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 16a-19a).

More importantly, the permanent waiver of trading restrictions on vessels built with CDS, even with full repayment of subsidy, can only disrupt the free market mechanism so carefully preserved for the domestic trade by the Jones Act and by section 506. Persons deciding to construct ships without CDS must be able to assess future demand and supply in that market. If ships supposedly limited to foreign trade can enter the domestic market whenever economic conditions make it desirable for them, future tonnage supply will be impossible to assess. Under these conditions, no capital will be invested in unsubsidized vessels.

Once built with CDS, a vessel takes its defined place in the supply and demand schedule of foreign trade potential, but it is simultaneously removed from the domestic trade inventory. The entire economics of the unsubsidized

fleet is built on this principle. *See Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 49a-51a).

Petitioners' contention that competition from subsidized vessels operating under temporary waivers upsets market projections in the same manner as permanent waivers is plainly incorrect. *See Seatrain Petition*, at 24. Six month waivers are awarded only after the Secretary determines that all subsidized vessels are employed and that additional tonnage is required. 46 C.F.R. Part 250. Thus, the six month waiver provision affords the Secretary the flexibility to prevent shortages of tanker supply in the domestic trade, while adequately protecting the unsubsidized fleet. Permanent waivers afford neither flexibility nor protection.

By the same token, respondent is not, as petitioners contend, reaping a windfall. Anyone, including petitioners, could have built unsubsidized vessels for use in the Alaska oil trade. Respondent should not be penalized for having the good judgment to have done so while others, including petitioners, did not. Petitioners should not be rewarded for having made the opposite judgment.

As stated at the outset, when the language of the Act and its history are accepted at face value, the proper result in this case is easily determined. This case is made difficult, and the briefs and court opinions are made thick, only by the inventive theories created by petitioners and the Secretary to escape the obvious prohibition against permanent waivers. These theories, while creative and, at times, beguiling, are hopelessly flawed. The Court of Appeals painstakingly laid each of them to rest. There they should remain.

B. The Court of Appeals' Decision Will Have Only a Minimal Impact.

Petitioners' contention that the Court of Appeals' decision will have an immediate adverse impact on the United States Treasury cannot withstand close scrutiny. *See Seatrain Petition*, at 11. Petitioners correctly observe that the government will not receive repayment of CDS if the Court of Appeals' decision stands. However, CDS is not a loan, but an outright award. The United States never expected to have this money returned. Its nonreturn cannot be of great consequence.

Petitioners' contention that $60 million of loans and guarantees extended by the Department of Commerce and secured by the STUYVESANT would be placed in jeopardy is wholly without basis. First, Seatrain Lines, Inc., the parent corporation of petitioners, has unconditionally guaranteed to pay these loans if necessary. Seatrain Lines, Inc. is a widely held corporation with substantial assets. There is nothing in the record which suggests that it could not meet its obligations. Second, the vessel itself, valued at $100 million by petitioners, could be foreclosed on by the United States to recoup its losses on the loans and guarantees. Third, $28 million of the $60 million at issue was borrowed to repay previous loans to the Seatrain shipyard by the Department of Commerce. On May 8, 1979, the shipyard announced that it was closing due to perpetual losses. N.Y. Times, May 9, 1979, at A1. col. 2. Thus, the likelihood that the United States would ever have recovered those funds is not great. Finally, the STUYVESANT has employment only through 1980. There is no guarantee that the vessel would not, at that time, become idle, thereby triggering the same chain of events petitioners attribute to the Court of Appeals' decision.

Petitioners' contention that the STUYVESANT would be forced into layup is meaningless. Since these proceedings first began, subsidized American tankers have been in layup. Several have had pending applications for six month waivers. If the STUYVESANT has employment in the domestic trade, it is at the expense of these vessels if not at the expense of unsubsidized vessels which it directly displaced from the trade.

Petitioners' contentions with respect to the more general consequences of the decisions on maritime policy are also incorrect. As noted above, the Court of Appeals' decision furthers the purposes of the Merchant Marine Act, 1936 and the Jones Act. Moreover, prior to Polk's waiver request, a subsidized vessel had entered the domestic trade pursuant to a permanent waiver only once, in 1964. The denial of a power the Secretary exercises so infrequently could hardly be considered a crippling blow to American maritime policy.

CONCLUSION

The opinion of the Court of Appeals is correct in all respects and entirely unremarkable. The petition for a writ of certiorari should be denied. Respondent earnestly hopes the Court will be able to act on the petition before the expiration of the Term, just as the Court of Appeals limited the stay pending application for the writ to May 1.

Respectfully submitted,

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BRIEF OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION IN OPPOSITION

Respondents Alaska Bulk Carriers, Inc. ("ABC") and Trinidad Corporation ("Trinidad") own U.S. flag tankers built without government subsidy and operate these tankers in U.S. coastwise and intercoastal ("domestic") trades. Petitioners Seatrain Shipbuilding Corporation ("Seatrain") and Polk Tanker Corporation ("Polk") had obtained the consent of the Secretary of Commerce to waive the statutory bar against operation in the domestic trades of one vessel built with government subsidy,

the T.T. STUYVESANT, so as to permit that vessel to operate without limitation in domestic trades. Petitioners seek review and reversal of the decision by the Court of Appeals for the District of Columbia Circuit that such a waiver was prohibited by the Merchant Marine Act, 1936.

QUESTION PRESENTED

Did the Court of Appeals properly interpret Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. §1156, as barring the Secretary of Commerce/Maritime Administration from granting an unlimited waiver for the operation of vessels built with construction differential subsidy for use in domestic trades?

STATEMENT OF THE CASE

Seatrain contracted to build for affiliated corporations a series of four very large oil tankers for use in the foreign commerce of the United States (R. 13, pp. 2-3). All four tankers were constructed with Construction Differential Subsidy ("CDS") granted by the Maritime Administration, an agency of the Department of Commerce, under Title V of the Merchant Marine Act of 1936 (R. 13, pp. 3-4, App. A at 8a.)[1] Title V is designed to promote construction of vessels in United States shipyards by equalizing, by direct government subsidy, the cost of construction of vessels in U.S. shipyards with such cost in foreign shipyards, so as to enable U.S. - built ships to compete with foreign-built ships in the foreign trade and promote the U.S. shipbuilding industry (App. A at 67a). CDS is available only for vessels which will be used in foreign commerce, since vessels used in domestic commerce suffer from no foreign competition (App. A at 6a). When CDS was awarded for the first two Seatrain tankers, those tankers were committed for long-term operations in foreign commerce. When CDS was awarded in 1972, however, for the third tanker built for Polk, the STUYVESANT, that vessel had no commitment for any employment (App. A at 9a).

[1] The Maritme Administration and the Secretary of Commerce are referred to herein collectively as "the agency."

Construction of the STUYVESANT and the fourth vessel in the series, the BAY RIDGE, was halted in 1975 when a severe downturn in the demand for crude oil tankers in foreign trade made prospects of employment problematical for these last two vessels, which were built on speculation (App. A. at 9a-10a, fn. 15). Construction of the STUYVESANT then recommenced when Standard Oil Company of Ohio ("Sohio") agreed to charter the STUYVESANT for *three years* in the *domestic* trade (*Id.*), and the vessel was completed in 1977. In addition to the CDS of $27.2 million given by the agency to the shipyard, the agency also guaranteed, under Title XI of the Merchant Marine Act, $30.2 million of loans to finance the construction of the vessel, and the Economic Development Administration ("EDA"), another agency of the Commerce Department, granted a $5 million loan to Seatrain and guaranteed 90 percent of an additional $82 million of private loans to Seatrain for the purpose of maintaining the yard constructing the STUYVESANT and the BAY RIDGE (App. A at 8a-9a).

The first *public* notice of the Sohio agreement to use the STUYVESANT in the domestic, Alaskan oil trade came two years later when, on July 8, 1977, Polk filed with the agency an application for a "three-year waiver" of the restrictions imposed by Section 506 of the Merchant Marine Act, 1936, so that it could timecharter the STUYVESANT to Sohio for three years to carry oil

from Alaska to the Continental United States (App. A at 10a). Section 506 requires that "[e]very owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, . . . " but permits the agency to consent to the "temporary transfer" of vessels built with CDS to trades other than foreign trades only "for periods not exceeding six months in any year," and only when the agency determines "that such [temporary] transfer is necessary or appropriate to carry out the purposes of [the Merchant Marine] Act" (App. A at 122a-23a).[2] The agency nevertheless assigned petitioners' application a Docket number, S-565, and on July 19, 1977, published notice of the application in the *Federal Register*, 42 Fed. Reg. 37,299 (1977). Numerous comments in opposition to the application were filed, all pointing to the agency's lack of statutory authority to deviate from the terms of section 506 of the Act (App. A at 10a-11a).

While the application for a "three year waiver" was pending, the agency held several *ex parte* meetings with petitioners and eventually accepted a proposal submitted by Polk that the agency release the restrictions of the subsidy contract under which the STUYVESANT was constructed, thereby permitting operation of the vessel in the otherwise prohibited domestic trades, upon Polk's execution of a 20-year promissory note (payable in 40 semiannual installments) for the amount of the $27.2 million CDS (App. A at 11a). The agency did not notice this new proposal in the *Federal Register*, but instead confirmed its approval of Polk's proposal by two letters to Polk, both dated August 31, 1977 (*Id.*). One of the

[2]The full text of section 506 is set forth in the Appendix at the pages cited.

letters and a press release subsequently issued by the agency stated that approval of the Polk proposal was given because the continued operation of Seatrain was in jeopardy, which in turn meant that it might default on its obligation to the various agencies of the Department of Commerce (R. 1, Exhibits B-1, C).[3]

In September, 1977, respondents ABC and Trinidad, and respondent Shell Oil Company ("Shell") filed a complaint seeking district court review of the agency actions with motions for temporary and preliminary injunctive relief. A temporary restraining order was issued on September 22, 1977; preliminary injunctive relief was denied on September 30, 1977 principally on the ground that plaintiffs had failed to show immediate irreparable injury (App. A at 12a, R. 21, pp. 3-4). Following the denial of the motion for preliminary injunction, the transactions involving the STUYVESANT were "closed" (App. A at 12a). These transactions included the transfer of ownership of the vessel without any restriction against use in domestic trades, the making of additional irrevocable Government financing guarantees, and a three-year charter of the vessel for use in the carriage of oil from Alaska to the Continental United States (App. A at 71a).

Discovery proceeded on an expedited schedule and the parties filed cross-motions for summary judgment (App. A at 12a, and at 12a, fn. 22). The trial court issued an opinion and order on November 22, 1977 (App. A at 65a-95a) which (1) granted the motions of ABC, Trinidad, and Shell for summary judgment on the ground that the permanent waiver had been granted without any consideration of the competitive effects thereof and there-

[3]Subsequently, the agency dismissed its docketed proceeding S-565.

fore in violation of the Administrative Procedure Act,[4] and remanded the case to the agency for such consideration;[5] (2) denied the motions of ABC, Trinidad, and Shell for summary judgment on the issue of the agency's lack of legal authority to grant permanent waiver and granted the agency's and petitioners' motions for summary judgment sustaining the agency's legal authority; and (3) denied the agency's and petitioners' motions for summary judgment on another claim of procedural irregularity and retained that issue for disposition by the Court (App. A at 94a-95a). By further order entered on November 30, 1977, the trial court dismissed the remaining pending claim and entered final judgment with respect to all claims decided by the Court (R. 53).

Appeals from the trial court's decision were filed in the United States Court of Appeals for the District of Columbia Circuit, and the Court of Appeals rendered its decision on February 6, 1979 (App. A at 2a). The Court of Appeals reversed the trial court's decision, holding that the agency's actions were beyond its statutory authority (App. A at 51a). A dissenting opinion, filed by Judge Bazelon, would have sustained the judgment of the trial court (App. A at 60a-61a). Seatrain, Polk, and the agency petitioned for rehearing with a suggestion for rehearing *en banc*; these petitions were denied, the latter by the full court,[6] with Judge Bazelon

[4]The trial court held that the protection of unsubsidized vessels from unfair competition by subsidized vessels was "one of the cornerstones of the statutory scheme" (App. A at 92a).

[5]The trial court did not, however, enjoin the operation of the STUYVESANT in domestice trade during the period of remand, and the vessel continued its operations in the Alaskan trade.

[6]The original order denying the suggestion for rehearing *en banc* filed March 22, 1979, shows consideration by the entire [footnote continued]

noted as in favor of granting both petitions (App. A at 62a-64a).

On March 29, 1979, Seatrain, Polk and the agency filed with the Court of Appeals a petition for a stay of the mandate pending application to this Court for a writ of certiorari. That motion was granted on April 19, 1979 but the stay was ordered only through May 1, 1979. The petition herein having been filed on April 30, 1979, the stay is still in effect, and the STUYVESANT continues to operate in the domestice trade, as it has since October, 1977.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE DECISION BELOW WILL HAVE NO SIGNIFICANT IMPACT ON THE ADMINISTRATION OF THE FEDERAL MARITIME PROGRAM

Petitioners predicate the need for review and reversal of the decision below on the claim (p. 10) that the decision has a significant impact on the future of the federal maritime program in addition to its "staggering economic consequences" to petitioners.[7] Yet the claim

court, with only Judge Bazelon recorded as in favor of a rehearing *en banc* (App. A at 63a-64a). An amendment to that order was later filed showing that Judge Levanthal did not participate in the decision on the suggestion for rehearing *en banc* (Order, 4/3/79).

[7]Petitioners make no claim that the Court of Appeals decision conflicts with any decision of any other district or appellate court, or any decision of this Court. The petitioners' statement (p. 10) that of the four federal judges who have considered the case there has been an even split is not precise. There was a majority *appellate* decision against petitioners' position, and there was a 7-1 *appellate* decision not to reconsider the majority opinion.

of national importance rests solely on the inhibition of "flexibility" and "discretion" allegedly needed by the agency. The agency has the flexibility, under section 506 of the Act, in its discretion and for the proper statutory reasons, to waive the restriction against operation by CDS vessels in domestic trades for six months in any one year or, indeed, from year to year. If the agency needed "flexibility" and "discretion" in administering the national maritime program beyond that conferred by section 506, the powers which the Court of Appeals held were unlawfully exercised here by the agency would presumably have needed considerable flexing during the 43-year implementation of that program. But in the 43 years since the Merchant Marine Act was passed, this is the first and only instance in which the agency has attempted to go beyond the six-month waiver authority conferred by section 506 and waive the restriction against unlimited operation in the domestic trades by vessels built with CDS.[8] The waiver here was for one vessel for the stated purposes of rescuing both (1) the vessel's owners from the consequences of building a vessel for foreign trade which, due to changes in market conditions, was no longer profitable; and (2) the government from the financial consequences of repeatedly

[8]Once, and only once, before was this issue even concretely posed to the agency, and that was in 1964 for a waiver in respect of two "Grace Line vessels" originally built unsubsidized, later converted with use of subsidy funds for foreign trade, and then contracted for sale to operators in the domestic trade, (App. A at 29a-31a). The agency determination to waive the restrictions for the Grace Line vessels was not opposed by other operators, was not judicially tested, and was based on an interpretation by the Comptroller General of Section 506 of the Merchant Marine Act which was repudiated by the trial court and by petitioners here (App. A at 32a).

granting financial assistance to a private venture which had become, and perhaps always was, not viable.

The Merchant Marine Act, 1936, explicitly says that CDS may be granted only for vessels built for foreign trade and that the agency may allow such vessels to be used in domestic trade only for six months in any year. The Court of Appeals' decision held that the Merchant Marine Act, 1936, meant what it says and thus confirmed the bar against permanent operation of vessels built with CDS in the domestic trades, a bar that has been relied on by all segments of the merchant marine industry who have planned the operation of their businesses according to these fundamental statutory precepts.

Thus petitioners' claim (pp. 11-12) that the decision below curtails "flexibility" and "discretion" needed by the agency is contradicted by the fact that the merchant marine industry has been observing the statutory rules of the road as interpreted by the Court below since the statute was passed. Petitioners' effort to elevate its singular predicament into an event of national importance for the purpose of obtaining this Court's review is unfounded.[9]

II.

THE DECISION BELOW WAS CORRECT.

Even were petitioners' problem of more general significance, the Court of Appeals decision would still not merit this Court's review because that decision was correct. By scrupulously analyzing the statute and its legislative

[9]*See* Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955) holding that to merit the attention of this Court, a problem must reach "beyond the academic or episodic."

history and answering every condition advanced again here by petitioners, the Court of Appeals showed that petitioners' construction of that statute contravenes its language, its intent, and the policies which it was designed to promote. The challenges repeated here were all conclusively and correctly answered by the Court of Appeals.

A. The Secretary's Authority (Petition, pp. 12-14).

Petitioners concede (p. 12) that the Act does not authorize "*en haec verba*" the agency to lift the bar against permanent operation in domestic trades of vessels built with CDS. Petitioners refer to sections 504 (App. A at 122a) and 207 (App. A at 99a) as evidence of the "broad" discretionary powers conferred on the agency with respect to the subsidy program. The Court of Appeals considered these sections and correctly concluded that neither section authorizes the agency to override express statutory commands (App. A at 39a-43a).[10] Thus if lifting of the bar against CDS built vessels for domestic trade is, as the Court of Appeals held, prohibited by section 506 of the Act, citations to general statutory powers conferred upon the agency do not advance petitioners' argument.

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[10] As the Court of Appeals stated (App. A at 39a, fn. 100), the government concluded that section 504 does not even address the issue of amending subsidy contracts, and the section speaks of limiting restrictions in the necessary documents to those required by law (App. A at 40a). The restriction against use of the STUYVESANT in the domestic trade was written into the CDS contract itself and provided that such restriction would "run with the title to the Vessel." (App. A at 14a, fn. 26). Section 207 was held no more than "a 'housekeeping statute,' and a similar provision is found in nearly every administrative agency basic statute." (App. A at 41a-42a).

B. Section 506 Of The Act (Petition, pp. 14-20).

The Court of Appeals meticulously examined the language (App. A at 13a-19a), the legislative history (App. A at 19a-29a), and the administrative interpretation (App. A at 29a-36a) of section 506 and concluded that it did, and was intended to, bar the waiver which the agency purported to grant petitioners. Petitioners' arguments do not detract from the Court of Appeals' analysis.

Petitioners claim (p. 15) that the restriction of section 506 attaches only while a vessel "retains the financial benefits of the subsidy." That is not what the statute says. The statute says that:

> "Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade. . . ." (App. A at 13a)

There is no statutory mechanism permitting an owner to "buy" a waiver of the restriction against use of the vessel in domestic trades for a payback of subsidy *except* one:[11]

> "The Commission may consent in writing to the temporary transfer of such vessel to service other than service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act." (App. A at 123a)

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[11] Another "exception" contained in section 506 pertains not to continuous use of the vessel in domestic trade but allows certain intercoastal carriage of cargo on described foreign voyages (App. A at 14a-15a, 122a-23a).

As the Court of Appeals held, this exception excludes other exceptions (App. A at 15a-16a) and especially excludes the construction urged by petitioners here, which is that the recipient of the subsidy may exhange all or a proportion of the subsidy in return for a total or a proportionate lifting of the statutory bar. As the Court of Appeals stated, the bar, once imposed, runs with the life of the vessel:

> "The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade." (App. A at 14a)

Petitioners' legislative history argument (pp. 15-17) rests principally on the contention that a 1938 amendment to section 506 confirmed the interpretation that the statutory bar is waivable upon agency agreement to accept a payback of subsidy.[12] As the Court of Appeals' decision painstakingly shows, the 1938 amendment is the strongest possible evidence that Congress intended to and did include in section 506 the only exception to the continuous use in domestic trades of vessels built with CDS--an exception limited to six months in any year. Thus section 506, as originally enacted, was ambiguous in that it seemed to refer to two cases in which vessels built with CDS could operate in domestic trades: (1) upon "the written consent of the Commission so to operate [and

[12]While the petition speaks (pp. 11-12) of "vessels that once received but have remitted their subsidy," Seatrain has not remitted its subsidy: it merely promised to do so over the economic life of the vessel. The issue of whether such a promise was equivalent to payback was not reached by the Court of Appeals since it held that the agency lacked power to waive statutory restrictions whether or not subsidy was in fact repaid.

the proportionate repayment of subsidy]" and (2) "If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel" but for no longer than three months (App. A at 22a). Upon testimony by the then Maritime Commission Chairman that the section was ambiguous in that the Commission did not know whether waivers were restricted only to cases of emergency and then to periods of three months (App. A at 24a-25a), or whether other and longer waivers were permitted provided there was a proportionate subsidy repayment, the statute was amended to specify that waivers may be given by the agency, without reference to findings of "emergency," but for no longer than six months in any year, and with proportionate payback of subsidy. This change was explained by the same Maritime Commission Chairman as conferring power upon the Commission to consent to operation in domestic trade (other than domestic portions of worldwide voyages) but such consent was "limited to six months in any one year" (App. A at 26a) and that explanation is found in both the Senate and House Reports which accompanied the 1938 bill amending section 506 (*Id.*).

Petitioners' reliance on the legislative history of the 1938 amendment refers not to this direct evidence of the reason for the amendment -- a reason specifically applicable to petitioners' claim that the agency may grant waivers for longer than six months in any year -- but instead weaves an argument that Congress' deletion of the only language which might have given the agency the power to grant permanent waivers was somehow evidence of an intent to confirm this power, provided only that subsidy payback is made in proper proportion to waiver (Petition, pp. 16-17). The support for that construction

is said to lie in the fact that the unsubsidized operators opposed the 1938 amendment (Petition, p. 17). Indeed they did, because they urged that Congress prohibit the agency from granting *any* waiver, even a temporary one, of the bar against use of vessels built with CDS in the domestic trades.[13] The unsubsidized operators were unsuccessful in this attempt, and the balance was struck in favor of permitting the agency to waive the bar but for no longer than six months in any year.

The alleged consistent interpretation of the Act by the agency (Petition, pp. 17-20) do not withstand analysis as shown by the Court of Appeals' discussion of each of them (App. A at 29a-36a). Indeed, as the Court of Appeals' opinion shows, the agency construed the statute as we do in denying, in 1970, a request by the parent of Seatrain to include in the subsidy contract the option to waive the statutory bar upon repayment of subsidy (App. A at 33a-34a).

C. The Purposes And Policies Of The Act (Petition, pp. 20-25.)

Petitioners claim that the waiver they secured from the agency is necessary to further two broad purposes: (1) competition[14] and (2) recognition of discretion in the

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[13] *Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committees on Commerce and Education and Labor, Part 2*, 75th Cong., 2d. Sess. 44 (1937).

[14] Petitioners interest in competition was not so evident when it sought to preclude ABC, Trinidad, and Shell from securing consideration by the agency of the competitive effect of the waiver by arguing that its competitors had no standing to challenge agency actions. Thus petitioners defended against the one successful challenge in the trial court – the failure of the agency to even consider the competitive effect of the waiver -- by arguing that its competitors lack standing to secure that judicial relief. The standing argument was raised again to the Court of Appeals by petitioners cross-appeal from the trial court's decision, but appears to have been abandoned here.

agency to carry out the purposes and policies of the Act. Petitioners predicate (pp. 7, 24-25) the "need" for competition in the Alaskan oil trade on an alleged public interest in providing additional tonnage for that trade. But as the Court of Appeals plainly showed, the Government conceded that it could not make a finding that long-term competition from subsidized vessels was needed to alleviate any undertonnaging in the Alaskan oil trade, and such finding cannot be made for any trade:

> ". . . a finding of need and no competitive effect resulting from the entry of a subsidized vessel into the entire U.S. domestic trade for the permanent life of the vessel -- a period in excess of 25 years -- is a finding impossible to make. No Government agency or private enterprise can logically make a finding of need for this or any other vessel for its entire life." App. A at 17a-18a.

Indeed, as the Court pointed out, the agency itself had said in early 1978 that it could not predict supply and demand of tankers in the Alaskan oil trade beyond 1980 (App. A at 18a, fn. 34). Thus the impossibility of making long-range predictions to support a lifetime waiver of the statutory bar confirms the wisdom of the statutory limitation of such waivers to six-month periods.

The Court of Appeals specifically considered the competitive effect of its decision (App. A at 49a-51a), and concluded that the long-term competitive goals of the Act would be impeded by allowing the competition of the STUYVESANT, a vessel built with CDS for foreign trade, into the domestic trades, hitherto served by vessels built for the domestic trades without CDS. In considering the argument that the agency needs permanent waiver authority to promote competition in domestic trades. the Court of Appeals looked beyond the Alaskan oil

trade to the whole shipbuilding and ship-operating industry, and concluded that the permanent waiver authority petitioners would imply into the Act would inhibit long range competition because of the market uncertainty thereby introduced (*Id.*). Thus in these industries, which require the commitment of huge capital resources, there is a particular need to understand the legal framework in which Government aid may play a part (App. A at 49a-50a, and see R. 2, pp. 1-5). The permanent waiver authority exercised here for the first time in 43 years for a vessel built for foreign trade with CDS introduces "into the domestic portion of our maritime trade a totally variable and incalculable factor" (App. A at 50a) -- a factor which the Court of Appeals concluded "would inevitably have a depressive impact on the future of American shipbuilding and ship operations by American owners" (App. A at 50a-51a). Contrary to petitioners' claims, the Court of Appeals gave full weight to the competitive policies of the Act, and correctly determined that these policies would be undermined were petitioners afforded relief from their commitment to operate the STUYVESANT in foreign trade.

CONCLUSION

For the reasons set forth above, respondents Alaska Bulk Carriers, Inc. and Trinidad Corporation respectfully submit that the Petition For a Writ of Certiorari should be denied.

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No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is not yet reported. The opinion of the district court (Pet. App. 65a-95a) is reported at 445 F. Supp. 1128.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. A petition for rehearing was denied on March 22, 1979 (Pet. App. 62a-64a). The petition for a writ of certiorari was filed on April 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Commerce may relieve a vessel that has received and repaid a federal construction subsidy of the trade restrictions imposed by Section 506 of the Merchant Marine Act.

STATEMENT

1. In 1972 petitioner Seatrain Shipbuilding Corporation began constructing the T. T. STUYVESANT, a 225,000 deadweight ton oil tanker, with the aid of a $27.2 million construction-differential subsidy ("CDS") from the federal government. See Title V of the Merchant Marine Act of 1936 ("the Act"), 46 U.S.C. 1151-1161.[1] In accordance with Section 506 of the Act, 46 U.S.C. 1156, petitioners promised (as a condition of receiving the CDS) to operate the STUYVESANT in the foreign rather than the domestic trade.[2] Unfortunately, by the time the STUYVESANT

[1] Petitioner Seatrain and its corporate affiliate, petitioner Polk Tanker Corporation (the owner of the STUYVESANT) received additional federal financial aid: pursuant to Title XI of the Act, 46 U.S.C. 1271-1280, the government guaranteed $30.2 in construction loans for the STUYVESANT itself; the Economic Development Administration of the Department of Commerce ("EDA") had loaned petitioners $5 million and given 90% guarantees on another $82 million in loans in order to make possible Seatrain's conversion of the old Brooklyn (New York) Navy Yard into a civilian shipbuilding facility (Pet. App. 8a-9a, 69a).

[2] "Foreign trade" means trade between a foreign port and an American port. "Domestic trade" means trade between American ports. See *American Maritime Association* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). See also 46 U.S.C. 883. CDS money is unavailable to ships operating in the domestic trade. See *id.* at 1151(a), 1156.

was completed in 1977, no market existed for the STUYVESANT in the foreign trade, and there is no prospect for gainful employment in that trade for the foreseeable future.[3] There is a demand, however, for the services of the STUYVESANT in the Alaskan oil trade. In June 1977 the Standard Oil Company of Ohio (SOHIO) contracted with petitioner Polk for a three-year charter of the STUYVESANT for operations in the Alaskan trade (Pet. App. 8a-10a, 69-70a).

Because the STUYVESANT had received a CDS, Section 506 precluded it from operating in the domestic trade for more than six months in any year. See 46 U.S.C. 1156.[4] But it is not economical to operate the STUYVESANT for only six months per year, and the SOHIO contract was dependent on petitioner's arranging for the STUYVESANT to operate in the domestic trade for the entire three years. Accordingly, in August 1977 petitioners filed an application with the Assistant Secretary of Commerce for Maritime

[3] The low oil prices and high demand of the 1960s and early 1970s spurred a world-wide flurry of oil tanker building. Reductions in demand below what was expected meant that there soon was excess capacity. Because they face higher construction and operating costs, American flag vessels are unable to compete with the surfeit of foreign vessels, despite the CDS and ODS (operating differential subsidy (see 46 U.S.C. 1171-1183a)) programs.

[4] The Secretary must authorize any such temporary transfer to the domestic trade.

Affairs and the Maritime Subsidy Board, requesting that the Secretary of Commerce accept full repayment of the STUYVESANT's CDS in exchange for the termination of the STUYVESANT's domestic trade limitations (Pet. App. 10a-11a, 70a).[5]

On August 31, 1977, the Secretary (through her designees) agreed to release the STUYVESANT permanently from its Section 506 restrictions on repayment in full of the CDS. The Secretary allowed petitioners to repay the CDS by a fully-secured 20-year interest-bearing note. The Secretary also approved the issuance and sale of $31 million worth of federally-guaranteed bonds as part of the STUYVESANT repayment, sale and charter transactions.[6] The Secretary found that her actions were warranted because (1) the STUYVESANT could be operated profitably only in the Alaskan trade, (2) the SOHIO charter, which was dependent on a termination of the CDS restrictions, would improve the security for debts owing to the government and prevent default on the government-guaranteed obligations, and (3) the economic vitality of Seatrain's Brooklyn Navy Yard operations, which are backed by substantial government guarantees, was inextricably linked to the profitable operation of the STUYVESANT (Pet. App. 11a, 70a-71a, 91a; R. 43).

[5] Previously petitioners had sought a three-year release in exchange for a pro rata repayment of the CDS (Pet. App. 10a-11a, 70a; R. 30-42). See 42 Fed. Reg. 37229 (1977). Petitioners withdrew this application in the face of objections by various shippers in the Alaskan trade.

[6] Petitioner Polk was to transfer title in the STUYVESANT to the United States Trust Company ("USTC") as trustee for the equity owner, the General Electric Credit Corporation ("GECC"). USTC was to assume both the note issued by petitioner Polk and the more than $60 million indebtedness on the STUYVESANT. (The $60 million included the $31 million in new bonds.) USTC used the bond proceeds to pay off $28 million in EDA-guaranteed loans and also paid Polk an additional $32.6 million, to be held in a special account as security for a guarantee by petitioner's parent to GECC. Finally, USTC chartered the STUYVESANT to Queensway Tankers, which in turn chartered it to SOHIO for three years.

2. On September 22, 1977, respondents Shell Oil Company, Alaska Bulk Carriers, Inc. and Trinidad Corporation ("the plaintiffs") filed suit in the United States District Court for the District of Columbia against various federal defendants.[7] The plaintiffs argued: (1) that the Secretary was without power to release the STUYVESANT from its Section 506 restrictions, (2) that, in any event, the Secretary had abused her discretion by failing to consider the competitive effects of these transactions, and (3) that the Secretary had not adhered to the procedures prescribed by the Administrative Procedure Act ("APA"), in violation of 5 U.S.C. 706(2)(D). The district court issued a temporary restraining order. On September 29, 1977, the court dissolved that or-

[7] The defendants were Secretary of Commerce Juanita Kreps, Assistant Secretary of Commerce Robert Blackwell, then Deputy Assistant Secretary of Commerce Howard Casey, then General Counsel to the Maritime Administration Samuel Nemirow, the Maritime Administration, and the Maritime Subsidy Board (Pet. App. 4a, 66a; R. 20-21, 53-54). The district court allowed petitioners to intervene as defendants (R. 88-90).

der and denied the plaintiffs' request for a preliminary injunction. The STUYVESANT transactions were closed the following day (Pet. App. 12a, 66a, 71a-72a; R. 18-86, 103-107).

Both sides then moved for summary judgment. The district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from its restrictions in exchange for repayment of the CDS. According to the district court, such power is inherent in the Secretary's broad contractual powers under Sections 207, 504, and 1104(a)(3) of the Act, 46 U.S.C. 1117, 1154, 1274(a)(3). The court further held, however, that the Secretary had abused her discretion in failing to analyze the economic effects of the STUYVESANT transactions on domestic carriers. Accordingly the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. Finally, the court denied the parties' cross-motions for summary judgment regarding the plaintiffs' APA claim, finding that material facts relating to it were in dispute (Pet. App. 65a-95a).

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss their APA claim and asked for entry of a "final order." On November 30, 1977, the district court granted this motion and entered a "final order," apparently relying on Fed. R. Civ. P. 54(b) (R. 246-247). While the Secretary was still conducting the proceedings on remand, the plaintiffs appealed from the district

court's holding that the Secretary has the authority to accept repayment and permit a ship to engage in the domestic trade.

Prior to oral argument in the court of appeals, the Secretary concluded that the transactions would have little or no adverse effect on the plaintiffs.[8] The Secretary therefore adhered to her prior decisions regarding the STUYVESANT.[9]

A divided panel of the court of appeals held that the Secretary cannot lift the STUYVESANT's domestic trade restrictions. The court rejected the Secretary's argument that her broad contractual powers under the Act supplied such authority, concluding that the six-month temporary waiver provision in Section 506 impliedly negated any authority to grant permanent releases (Pet. App. 1a-51a). Judge Bazelon dissented, arguing that the legislative history of Section 506 does not support the conclusion that Congress intended to preclude lifting the domestic trading restrictions (*id.* at 52a-61a).

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[8] The Secretary made detailed findings about the demand for tankers in the Alaskan market and concluded that demand would continue to exceed supply for the foreseeable future (R. 590-630).

[9] Plaintiff Shell filed a second suit in the district court challenging the Secretary's findings on remand. *Shell Oil Co.* v. *Kreps*, Civ. No. 78-1919 (D. D.C. Oct. 13, 1978). The district court dismissed that action without prejudice following the court of appeals' decision in this case.

DISCUSSION

This case involves a significant issue concerning the Secretary's power to administer the maritime construction subsidy program established by Congress in 1936. The Act carries out a long-standing federal policy—based on military, economic and political considerations—of subsidizing the construction of this country's overseas merchant marine fleet. See, *e.g.*, H.R. Rep. No. 1277, 74th Cong., 1st Sess. 1-4, 11-13 (1935). The court of appeals' holding that the Secretary cannot accept repayment of the subsidy and lift the Act's domestic trade restrictions undermines the purposes of the Act. It will cause an American flag vessel to be denied employment. At a time when there is insufficient capacity to carry Alaskan oil, an American vessel will be laid up. Moreover, by creating the risk that a vessel, once subsidized, will be denied available employment, the decision makes the CDS program less attractive to builders and owners, thus further undermining the statutory program.

Although the decision is one of first impression in the courts, it conflicts with an earlier decision by the Comptroller General.[10] There will never be a conflict among the circuits on the meaning of the Act: any person dissatisfied with the Secretary's decision to accept repayment of a CDS would file suit in the District of Columbia. And although the Secretary

[10] In 1964 the Comptroller General issued an opinion upholding the Secretary's power permanently to relieve a vessel of its Section 506 restrictions. Decision B-155039, 44 Comp. Gen. 180 (1964) (the Grace Line decision).

has entered into a transaction equivalent to that underlying this case on only one prior occasion, she believes that her ability to arrange such transactions in appropriate circumstances may be of substantial importance.[11] If there were not a jurisdictional defect in this case, we would urge the Court to grant plenary review. There is a substantial jurisdictional problem, however, and we therefore urge the Court to grant the petition and to vacate the decision.

1. 28 U.S.C. 1291 permits courts of appeals to review "final decisions" of district courts. The finality rule reflects a strong congressional policy against piecemeal review. *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). "Federal appellate jurisdiction generally depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Accordingly, an order rejecting plaintiffs' view of Section 506, but remanding this case to the Secretary for further proceedings, is not appealable. See, *e.g.*, *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978); *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976);

[11] In this case, the government stands to lose a not insignificant amount of money. More important, the court of appeals' decision will force a new American oil tanker to sit idly by while its shipyard ceases operations and needed Alaskan oil remains in the pipeline awaiting shipment.

Pauls v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). See also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3914, at 550-553 (1976).

The facts of this case indicate why remand orders are not generally "final". The district court's order of November 22, 1977, remanded this case to the Secretary for consideration of the effect of her decision on the existing transporters of Alaskan oil (Pet. App. 90a-95a; R. 245-A to 245-B).[12] Had the Secretary concluded on remand that the economic consequences of allowing the STUYVESANT to enter the domestic trade dictated a different course of action,

[12] The court's order of November 30, 1977, which was entered prior to the administrative hearings and decision on remand, did not terminate the order of remand. Rather, it purported to make its order of remand, which was based on cross-motions for summary judgment, "final" under Fed. R. Civ. P. 54(b). Rule 54(b) allows a court to enter a final judgment on behalf of a party whose liability has been finally determined in a multiple-person suit that is otherwise not final. Here, in contrast, all parties participated in the remand proceedings. No party's claims were completely determined. Moreover, because there was only one request for relief in the case—for cancellation of the Secretary's decision—no claim for relief has been finally determined for all parties. Nor is this a situation in which one party raises several distinct and unrelated claims, less than all of which have been finally determined. There was thus no basis for invoking Rule 54(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). And a district court's erroneous Rule 54(b) certification is not effective to create appellate jurisdiction. *Ibid.*

plaintiffs would have received the relief they sought. They would have had no basis for an appeal. The Secretary's finding on remand that the STUYVESANT decision had no discernible effect on the plaintiffs strongly suggests another problem—that the plaintiffs lack standing to bring this suit. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975). This issue, too, the district court should address in the first instance.[13] The plaintiffs were not even aggrieved by the remand, because that might have led to the relief they wanted. Accordingly, this case is in the same position as is any other case in which a plaintiff attempts to appeal from the denial of summary judgment or from an order granting remand to an agency for further proceedings: until the case comes to a close, there is no appealable order.[14]

[13] It is also arguable that the plaintiffs do not fall within the "zone of interest" protected by Section 506. See *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970). Section 506 protects domestic shipping from excessive competition with vessels that enjoy the advantage of CDS financing. The STUYVESANT no longer enjoys CDS financing, however, and nothing in Section 506 protects existing domestic shipping from additional unsubsidized competition.

[14] The district court's order granting partial summary judgment on the issue of the Secretary's power to terminate a Section 506 restriction cannot fairly be described as a collateral order within the meaning of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Section 506 issue is inextricably involved in the merits of this case, and

Because there is not yet a final order, the court of appeals lacked jurisdiction under Section 1291. The court could have had jurisdiction over this interlocutory order under 28 U.S.C. 1292(b), but there was no certification under that statute. That statute requires that the district court specially certify the question to be reviewed and that, within ten days of the certification, the parties ask the court of appeals to exercise its discretion to permit the interlocutory appeal. Neither occurred here.[15] Therefore the court of appeals had no jurisdiction to decide this case on the merits. Because the court of appeals resolved an important issue without jurisdiction to do so, the Court should grant the petition and summarily vacate the judgment.[16]

2. The court of appeals' decision on the merits is incorrect. Section 207 of the Act unequivocally empowers the Secretary and her delegates to "enter into such contracts, upon behalf of the United States, * * * as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect,

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the court of appeals could review that decision effectively on appeal from the final judgment. See *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468-469.

[15] See also note 12, *supra,* discussing the Rule 54(b) certification. An ineffective Rule 54(b) certificate is not an adequate substitute for a Section 1292(b) certificate. See *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 745.

[16] The government raised this jurisdictional issue for the first time in footnote 4 of its petition for rehearing. Because it is jurisdictional, it may be raised at any time. See *Liberty Mutual Insurance Co.* v. *Wetzel, supra.*

preserve or improve the collateral held by the [government] to secure indebtedness * * *." 46 U.S.C. 1117. See also Section 504 of the Act, 46 U.S.C. 1154 (giving the Secretary discretion to evaluate and approve or disprove CDS contracts). These expansive grants of authority are enough to support the Secretary's decision where, as here, the Secretary has found that the repayment and lifting of the domestic traffic restriction will improve the security of the government's loans and guarantees, will foster both an active merchant marine and a domestic ship building capacity, and will not harm the domestic fleet. See H.R. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

Nothing in the statute explicitly bars what the Secretary did here. The court of appeals concluded that Section 506 implicitly limits the Secretary's power by authorizing temporary waivers of the domestic trade restrictions that do not exceed six months in any year. This unquestionably means that the Secretary cannot allow a subsidized vessel to ply the domestic trade for seven months. But Section 506 does not mention or even hint at the proper rule when a vessel has completely repaid the subsidy. The STUYVESANT transaction is different in kind from that governed by the six-month exception contained in Section 506. When a ship that has received and retained CDS money operates temporarily in the domestic trade, it has a substantial financial advantage over its domestic competitors. (To some extent the mandatory repayment of a pro rata portion of the CDS neutralizes

this advantage. See 46 U.S.C. 1156. Nonetheless the temporarily transferred CDS ship continues to have a significant advantage attributable to its overall smaller amount of indebtedness.) Section 506 means that a vessel cannot enjoy this advantage over the competition for more than six months per year. The STUYVESANT, however, has disgorged its entire CDS. It therefore retains no financial edge over its competitors in the domestic market.[17] In other words, at the moment that petitioners repaid the CDS in full, it was as if they had built the STUYVESANT without a CDS. And nothing in either the logic or language of Section 506 suggests that Congress intended to prohibit increased competition among unsubsidized ships operating in the domestic trade.

Moreover, the legislative history of Section 506 indicates that the court of appeals has misconstrued the import of that provision. The original version of Section 506 permitted the Secretary permanently to relieve a subsidized vessel of its restrictions. See Act of June 29, 1936, ch. 858, Section 506, 49 Stat.

[17] Petitioners did get the advantage of interest-free money in the years between 1972 and 1977. The Secretary will seek to recover a reasonable amount of interest on the CDS for that period of time.

The plaintiffs' suggestion that petitioners were able to speculate at the government's expense is hyperbole. Since 1936 the Secretary has arranged for the permanent release of Section 506 restrictions on only two occasions. It is thus most unlikely that petitioners would have participated in the CDS program on the assumption that they could contract for a permanent release on a moment's notice. Their application might well have been denied.

1999.[18] Furthermore, the reports and debates confirm that Congress intended to permit the Secretary to undo a CDS transaction on repayment of that portion of the CDS "as the remaining economic life of the vessel bears to its entire economic life." See H.R. Rep. No. 1277, *supra*, at 22; S. Rep. No. 898, 74th Cong., 1st Sess. 44 (1935); *Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110, and S. 4111 Before the Senate Comm. on Commerce*, 74th Cong., 2d Sess. 57-58, 124, 133 (1936); *Amending the Merchant Marine Act, 1936: Hearings on S.*

[18] Section 506 then provided (emphasis supplied):

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, *unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid* (excluding cost of national-defense features as hereinbefore provided), *as the remaining economic life of the vessel bears to its entire economic life.* If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer. * * *

3078 Before the Senate Comm. on Commerce, Education and Labor, 75th Cong., 2d Sess. 44 (1937).

The amendment of Section 506 in 1938 produced, insofar as is relevant here, the current version of that statute. As the court of appeals noted, this amendment resulted in the deletion of the full repayment language that had appeared in the original Section 506. The court's further conclusion that the change in language reflected a purposeful intent to limit the Secretary's power is unwarranted, however. The House Report accompanying the amendment makes clear that the deletion was inadvertent, and that "[n]o fundamental change in the original purpose of the section has been affected." H.R. Rep. No. 2168, *supra*, at 21. By rewriting the statute Congress merely sought to clarify that temporary as well as permanent waivers of domestic trade restrictions require a pro rata repayment of the CDS. *Ibid.* Moreover, the same report confirmed that Section 207 gave "the Maritime Commission * * * all the general and implied powers of a business corporation." *Id.* at 17.

Finally, the court of appeals' decision fails to give sufficient deference to the Secretary's consistent, albeit rarely invoked, construction of the statute. See generally *E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In 1964 the Comptroller General rendered an opinion concurring in the Secretary's position on permanent releases. Decision No. B-155039, 44 Comp. Gen. 180 (1964). In 1972 Congress amended Section 1104(a)

of the Act to provide, *inter alia*, that the Secretary may guarantee private "financing [that aids in] the repayment to the United States of any amount of construction-differential subsidy * * *." See Pub. L. No. 92-507, 86 Stat. 911. 46 U.S.C. 1274(a)(3). The House Report notes that on one prior occasion the Secretary accepted full repayment and released the domestic trade restrictions; the Report then states that the new section authorizes the Secretary to guarantee the repayment of the CDS in that as well as other situations. See H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 9-10 (1971). See also S. Rep. No. 95-1528, 95th Cong., 2d Sess. 2 (1978). This amounts to ratification of the Secretary's construction of the Act, and the court of appeals should have followed Congress' view of its own law. See *Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be vacated summarily because that court lacked jurisdiction. If the court does not summarily vacate the judgment, it should set the case for plenary review.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

And

POLK TANKER CORPORATION

Petitioners,

v.

SHELL OIL COMPANY, et al,

Respondents.

BRIEF OF SHELL OIL COMPANY IN REPLY TO BRIEF FOR THE FEDERAL PARTIES ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June 8, 1979

On May 18, 1979, Respondent Shell Oil Company ("Shell") filed a brief in opposition to the pending petition for a Writ of Certiorari. Shell files this brief today to reply to the contention of the Federal parties that the United States District Court for the District of Columbia Circuit lacked jurisdiction to review the November 22, 1977 Order of the District Court. The Federal Parties first raised this contention in their petition for rehearing en banc, some 15 months after a notice of appeal from the District Court's Order was filed. The Court of Appeals found no merit in the Federal parties' argument, and, indeed, it has none.

Shell initiated this lawsuit not merely to bar the STUYVESANT from domestic trade but to challenge the defendants' claim of authority to waive permanently trading restrictions on vessels built with construction-differential subsidy ("CDS"). To that end, Shell alleged in the complaint that defendants' actions were contrary to the Merchant Marine Act, 1936. *Verified Complaint*, ¶ 33, p. 9. Shell prayed for a judgment declaring that defendants lacked authority to waive permanently trading restrictions and for an order permanently enjoining defendants from exercising such authority. *Verified Complaint*, p. 10. On November 22, 1977, the District Court entered an Order which granted summary judgment against Shell and its co-plaintiffs on these claims. (Appendix A, hereto). On November 30, 1977, the District Court implemented its decision by directing entry of *final* judgment. (Appendix B, hereto). Fundamental precepts of American jurisprudence, as well as common sense, indicate that appellate review of the November 22, 1977 Order was proper.

The District Court certified the November 22, 1977 Order for appeal under Rule 54(b) of the Federal Rules of

Civil Procedure. The November 22 Order, granting summary judgment on the discrete question of the defendants' legal authority and finally denying Shell's claims for a declaratory judgment and permanent injunction, plainly resolved separate claims for relief by Shell. These claims can be, and were, decided independently of the claims considered on remand. Rule 54(b) is properly invoked in such cases. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-37 (1956); *see Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976).

Contrary to the Federal parties' contention, the remand proceeding ordered by the District Court could not have afforded Shell the ultimate relief it sought on the claims the District Court certified for appeal under Rule 54(b). The remand would not in any way affect the District Court's holding that the defendants had authority to waive permanently trading restrictions. Similarly, the remand could not have resulted in a permanent injunction against defendants. At most, defendants would have been enjoined from waiving restrictions on one vessel at one point in time. Shell would, consequently, be confronted with the prospect of participating in an endless series of proceedings in which Petitioners and other subsidized operators sought permanent entrance to the domestic trade. Even had the defendants concluded on remand not to grant the waiver requested for the STUYVESANT, Shell would have continued to litigate before the Court of Appeals the question of defendants' authority to contemplate permanent waivers.

There can, thus, be no question that, absent the remand, the District Court's November 22, 1977 Order would have been a final order appealable under 28 U.S.C. § 1291. While the remand arguably makes a Rule 54(b) certification necessary, it hardly makes such a certification improper.*

Regardless of certification under Rule 54(b), the District Court's Order of November 22, 1977 was independently reviewable under 28 U.S.C. §1292(a)(1). This provision permits appeal from interlocutory orders which "touch on the merits" of a claim by denying requests for injunctions or declaratory judgments. *Switzerland Cheese Assoc., Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *see Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976). The granting of summary judgment against Shell, and the consequent final denial of declaratory and injunctive relief, falls within this provision.

Several misstatements of fact by the Federal parties deserve brief comment. The Federal parties, no doubt searching for social significance, represent that there is a shortage of tanker capacity to transport Alaskan crude oil and that, consequently, the Court of Appeals' decision may cause Alaskan oil to remain in the pipeline. *Brief for the Federal Parties*, at 8, 9 n.11. These statements are not supported by the record, and they are simply wrong. They are also at odds with statements the Federal parties made to the Court in opposing review of the decision permitting Alaskan oil to be transported to the Virgin Islands in foreign flag vessels. There, the Federal parties stated that

* Indeed, the Rule 54(b) certification in this case was probably superfluous. The Court granted summary judgment on all claims before it. The remand was not designed to develop facts bearing on the Court's ruling on the legal issues presented. Under such circumstances, immediate appellate review under 28 U.S.C. §1291 is appropriate. *E.g., Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (on rehearing); *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds*, 402 U.S. 389 (1971); *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)(28 U.S.C. §1291 should be given practical rather than technical construction).

unsubsidized United States Flag vessels "may be denied employment as a consequence of the court of appeals' decision." *American Maritime Association v. Blumenthal*, No. 78-1287, *Brief for the Federal Respondent in Opposition*, at 4 n.6. Moreover, SOHIO, owner of approximately 50 percent of all Alaskan crude, has just recently terminated charters for the MANHATTAN and the OVERSEAS JUNEAU, two large oil tankers which had been transporting Alaskan crude. The combined capacities of these two tankers are approximately equal to the capacity of the STUYVESANT.

In its Brief in Opposition to the Petition, Shell observed that this case did not present an issue worthy of review. It concerns but the first instance in the history of the Merchant Marine Act, 1936 in which a vessel built with CDS entered the domestic trade, and the legal issue decided below was resolved by long standing doctrines of statutory construction. The Federal parties' Brief does not provide any reason why the Petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,
v.
JUANITA M. KREPS, et al.,
Defendants.
C.A. No. 77-1645

ALASKA BULK CARRIERS, INC., and TRINIDAD CORPORATION,
Plaintiffs,
v.
JUANITA M. KREPS, et al.,
Defendants.
C.A. No. 77-1647

ORDER

Upon consideration of the cross-motions for summary judgment, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open Court, and the entire record herein, and in accordance with the Memorandum Opinion of the Court issued of even date herewith, it is, by the Court, this 22nd day of November,1977,

ORDERED, ADJUDGED, AND DECREED, that, for the reasons articulated on pages 23-26 of the Court's Memorandum Opinion of even date herewith, and because the Secretary failed to consider the competitive effects of her decisions, the decisions of the Secretary of Commerce to accept CDS repayment by means of a 20-year promissory note and to waive permanently domestic trading restrictions on the S.S. STUYVESTANT in exchange therefor be,

and the same hereby are, declared to be arbitrary and capricious and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A); and it is

FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiffs' motions for summary judgment be, and the same hereby are, granted insofar as they seek the declaratory relief ordered in the preceding paragraph; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, denied insofar as they seek judgment on plaintiffs' claim that the operative decisions with respect to the STUYVESTANT were made without notice in 1975 and kept secret until 1977, and this claim will therefore remain before the Court; and it is

FURTHER ORDERED, that defendants' and defendant-intervenors' motions for summary judgment be, and the same hereby are, granted with respect to all of plaintiffs' claims not covered by the preceding ordered paragraphs; and it is

FURTHER ORDERED, that this case is hereby remanded to the Secretary for reconsideration, in accordance with the Memorandum Opinion issued of even date herewith, of her decisions with respect to the STUYVESTANT; and it is

FURTHER ORDERED, that the Secretary shall complete the aforesaid reconsideration within 45 days of the date hereof; and it is

FURTHER ORDERED, that counsel for all parties shall be present in Courtroom 11 on November 30, 1977 at 9:30 A.M., for a status call in the above-captioned matter.

CHARLES R. RICHEY

Charles R. Richey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY,
Plaintiff,
v.
JUANITA M. KREPS, et al.,
Defendants.

Civil Action
No. 77-1645

ALASKA BULK CARRIERS, INC.,
and TRINIDAD CORPORATION,
Plaintiffs,
v.
JUANITA M. KREPS, et al.,
Defendants.

Civil Action
No. 77-1647

ORDER

Upon consideration of the motion of plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation to amend this Court's Order of November 22, 1977, which plaintiff Shell Oil Company joined in today at the status call held herein, and it appearing to the Court that all plaintiffs seek leave to dismiss from this case the claim remaining before the Court that the Secretary's decisions with respect to the STUYVESTANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977, and it appearing to the Court that this remaining claim is superfluous and would afford plaintiffs no greater relief than the remand which has already been ordered by this Court, and it further appearing that no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it

further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977,

ORDERED, that plaintiffs' motion to amend this Court's Order of November 22, 1977, be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiffs' remaining claim be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977.

CHARLES R. RICHEY

Charles R. Richey
United States District Judge

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION
and
POLK TANKER CORPORATION,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION TO BRIEF FOR THE FEDERAL PARTIES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION
and
POLK TANKER CORPORATION,
Petitioners.

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION TO BRIEF FOR THE FEDERAL PARTIES

REPLY ARGUMENT

I. THE GOVERNMENT CLAIM THAT THE DECISION OF THE DISTRICT COURT LACKS FINALITY IS UNWARRANTED.

The Government claims that the November 30, 1977 order sustaining the agency's permanent waiver authority appealed from was not final and hence not appealable because the District Court, although entering final judgment and not retaining jurisdiction of the case, had ordered a remand to the agency for further consideration of

one issue relating only to the exercise of that authority for the STUYVESANT.[1] The claim that the November 30 order was not appealable is wholly lacking in merit. The complaint challenged the agency's action with respect to the STUYVESANT and sought declaratory and injunctive relief challenging the legality of agency grant of permanent waiver authority for any future CDS-built vessels. The issue of legality was finally decided by the district court; and the agency decision on remand, pertaining only to one facet of the waiver granted for the STUYVESANT, could not have affected the final judgment rendered on that claim. Moreover, the district court did not retain jurisdiction of the case, but entered an order granting final judgment as to all issues tendered to the court, notwithstanding the remand. Any issues involved in a review of the agency remand decision would thus be independent of the issues involved in the appeal.

There is no question here of "piecemeal litigation." Assuming, *arguendo*, that the November 30 order was not appealable, it became so, under the Government's position, when the agency issued its decision on remand even before the time for appeal of the November 30 order had expired. Thus, if there were any technical prematurity of the notice of appeal, such prematurity had no consequences in respect of the course of the litigation. Moreover, the order met the requirements for appealability under 28 U.S.C. §1292(b) and under §1292(a)(1). There is no reason to vacate the decision below when the effect would be a new appeal to the court of appeals raising precisely the issues decided by that court. Such an act would promote judicial waste, not judicial economy. The Government's failure to raise any question about "finality" until after the court of appeals decision was rendered adverse to the Government's position on the merits shows that the jurisdictional issue raised here is insubstantial.

[1]Brief for the Federal Parties (hereafter "Government Brief").

A. The Order Appealed From Is Final And Appealable

The complaint filed by Respondents Alaska Bulk Carriers ("ABC") and Trinidad Corporation ("Trinidad") requested injunctive relief halting permanent operation of the STUYVESANT in domestic trades, and declaratory and injunctive relief preventing future unlimited waivers for domestic operation of other vessels built with construction differential subsidy ("CDS"). Ruling on cross-motions for summary judgment, the trial court found that the agency had abused its discretion in the STUYVESANT case by failing to consider the competitive effects of the waiver. Although it remanded to permit the agency to consider these effects within 45 days, it declined to enjoin operation of the STUYVESANT in domestic trade and it did not retain jurisdiction of the case. (App. A at 94a-95a).

Since the requests for declaratory and injunctive relief preventing future waivers, i.e., waivers other than for the STUYVESANT, were based solely on a challenge to the agency's legal authority, the trial court's action was unquestionably complete when it granted summary judgment for petitioners and the agency on this issue. When, on November 30, 1979, it subsequently granted respondent's motion for entry of final judgment (R. 53), an appealable order issued within the ambit of 28 U.S.C. 1291 and Fed. R. Civ. P. 54(b)[2]. The Government admits that a Rule 54(b) certification was made but contends that Rule 54(b), which allows a court to enter an appealable final judgment as to one or more but fewer than all of the claims or parties, was not satisfied by the trial court's November 30, 1977 order. It alleges that no party's claims were completely determined nor was any single claim of any party finally decided (Government Brief, p. 10, fn. 12). This argument ignores the claims against future permanent waivers which were completely resolved.[3]

[2]A copy of the Order is Exhibit I to this Reply.

[3]Respondents' claims were not limited as those in Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 743 (1976) to a single legal right

Furthermore, with its November 30, 1977 order, the trial court entered final judgment as to all issues including the issue remanded. It did not retain jurisdiction of the case after remand.[4] Accordingly, the decision was appealable notwithstanding the remand.[5]

The issues presented for appeal could not have been changed or mooted by the agency action on remand which was confined to the narrow issue of competitive effects. Even if the agency has changed its mind about the STUYVESANT, its action would not have changed or mooted the issue of the agency's legal authority which was

growing out of a single set of facts. They were directed both to the agency's action with respect to the STUYVESANT and to the separately raised issue of the agency's right to issue any future permanent waivers.

[4]The order effectively ended the litigation on the merits leaving nothing further for the court to do. Catlin v. United States, 324 U.S. 229, 233 (1945). Moreover, even if the order was not "the last order possible to be made in a case," it may be final depending on its character and effect. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964) discussed infra at p. 6.

[5]The Government states that remand orders are not "generally" final (Government Brief, p. 10). But in the cases on which it relies, there are circumstances other than the remand which indicate a lack of finality. In Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968) the district court expressly declined to find the order appealable, and in Bachowski v. Usery, 545 F.2d 363 (3rd Cir. 1976) there was no certification made by the district court. In Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972) the court retained jurisdiction for review of the agency determination. Freeman v. Califano, 574 F.2d 264, 268 (5th Cir. 1978) was not treated as a remand case but one "controlled" by the rule that a finding of liability is not final where damages are to be measured before judgment is entered. In cases lacking such circumstances, decisions involving remands are appealable. See Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1975); Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir.), cert. denied, 421 U.S. 991 (1974); Wells v. Southern Airways, Inc., 517 F.2d 132 (5th Cir.), cert. denied, 425 U.S. 914 (1975); Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd on other grounds sub nom., Richardson v. Perales, 402 U.S. 389 (1971).

the focus of the appeal. In any event, the issues on appeal were not mooted; the agency reaffirmed its views on remand.

Likewise, there is no issue of piecemeal appeals. The remand decison was completed on January 6, 1978 (Jt. App. at 590) before the period for filing appeals from the November 30, 1977 order had expired.[6] The Government's discussion of the possibilities of piecemeal litigation is purely theoretical.[7] There is no litigation testing the remand order pending nor is any likely since the court of appeals decision effectively disposed of the case.[8] Furthermore, any issues involved in a review of the remand order would be independent of the issues involved in this appeal and thus properly subject to separate consideration.[9]

[6]All parties appealed. Respondents filed notice of appeal on November 30, 1977 (C.A. No. 77-1647, R. 54); Shell filed its notice on December 29, 1977 (C.A. No. 77-1645, R. 66). Petitioner *and the Government* filed notices of appeal on January 30, 1978 (C.A. No. 77-1645, R. 68 and 69).

[7]The only issue which the Government identified for consideration in a district court reviewing the remand decision is the standing of plaintiffs to bring this suit. This issue was fully litigated before the trial court (Defendant's Memorandum in Support of Motion to Dissolve Temporary Restraining Order and to Dismiss, R. 14, pp. 17-20) and before the court of appeals by petitioners (See Brief of Appellees-Cross Appellants Seatrain and Polk pp. 49-57). The Government dropped its cross-appeal raising this issue (Motion to Dismiss, 3/20/78, and Order, 5/5/78, C.A.D.C. No. 78-1216; C.A. No. 77-1645, 5/8/78). Its attempt to resurrect the claim now cannot be made in the name of administrative regularity and judicial economy.

[8]The court of appeals recognized that the district court had decided other issues, such as those necessitating the remand, but found it unnecessary to reach these issues because of its determination that the agency lacked any permanent waiver authority (App. A at 12a, fn. 22).

[9]Under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) an appeal is permitted where the order is collateral to the main decision. Here the opposite situation occurs; the remand order raises the collateral issue. Nevertheless, Cohen demonstrates the separate appealability of the remand case since a determination of whether the

It is difficult to understand how considerations of judicial economy could be furthered by requiring the parties to begin anew in the district court to secure a determination of the same legal questions already decided by the court of appeals by seeking review of the remand decision in a separate action, or not seeking such review, and merely appealing once again from the district court judgment upholding the agency's permanent waiver authority. If review of the issues decided on remand was sought in the district court, the likelihood is that a similar decision resting on the issue of legal authority to grant permanent waivers (without reaching issues presented by the remand) would be presented to the court of appeals and again to this Court since any district court decision can be expected to follow the vacated court of appeals determination.

This Court has not interpreted the finality doctrine so as to require unnecessary litigation. It has called for a practical approach balancing any inconvenience and costs of piecemeal review against the danger of denying justice by delay. *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 152-53 (1964). Here any danger of piecemeal litigation is highly remote, while the needs of the parties, particularly respondents and Shell, for a prompt decision has been repeatedly acknowledged.[10] This Court has

agency adequately assessed the competitive effects of a particular proposed waiver is not inextricably intertwined with a determination of the agency's power to grant such waivers under any circumstances. See also Radio Station WOW v. Johnson, 326 U.S. 120, 126 (1945) where an appeal was proper if the concluded adjudication raises issues which are "independent of, and unaffected by, another litigation with which it happens to be entangled."

[10]Proceedings in the trial court were expedited and a final judgment entered to facilitate a speedy decision on the basic legal issues (Transcript of Hearing, September 30, 1977, at 9:00 a.m., p. 9; App. A at 94a). The stay of mandate ordered by the court of appeals was limited in time to permit this Court to consider the petition this term because Shell's and respondents' vessels will soon be available for rechartering (R. 21, p. 1; Memorandum of Shell Oil Company in Opposition to Motion for Stay of Mandate Pending Application for Writ of Certiorari, 4/4/79, p. 1).

recognized that judicial economy is not achieved by sending a case back with an important issue left undecided, particularly where the question of appealability is raised for the first time before this Court.[11]

B. The Appeal Was Proper Even If The Order Was Not Final.

The Government position is based upon a meaningless technicality for, assuming that the judgment of November 30, 1977 was not final, it *became final* when the agency decision on remand was issued on January 6, 1978 reaffirming its prior action. At that point, respondents could have filed a notice of appeal, and the Government position means that such a notice would have been proper. The courts hold that an appeal should not be dismissed because it was technically premature if in fact an appealable judgment was rendered below, the appellant clearly manifested his intent to appeal, and the prevailing party can show no prejudice resulting from prematurity of the notice.[12]

The Government recognizes that the court of appeals could have had jurisdiction over the appeal under 28 U.S.C.

[11]Coopers & Lybrand v. Livesay, 437 U.S. 473, 98 S.Ct. 2454, 2462 fn. 30, discussing Gillespie v. United States Steel Corporation. The government first raised the issue in its petition for rehearing before the court of appeals (pg. 12, fn. 4).

[12]Richerson v. Jones, 551 F.2d 918, 922-23 (3rd Cir. 1977) applied these principles to a case where, as here, final action unquestionably occurred prior to the appeal. Richerson distinguished Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) (cited to support Government assertions that appeal "defects" are not correctable, Government Brief, p. 12, fn. 15) because in Liberty Mutual "the court at no time had a final order before it." Morris v. Uhl & Lopez Engineers, Inc., 442 F.2d 1247, 1250-51 (10th Cir. 1971); Hodge v. Hodge, 507 F.2d 87, 89 (3rd Cir. 1977); Stokes v. Peyton's, Inc., 508 F.2d 1287 (5th Cir. 1975); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971). See Foman v. Davis, 371 U.S. 178, 181 (1962); 9 Moore's, Federal Practice § 204.14, at 983 (2d ed. 1975).

§1292(b), but it asserts that the requirements of certification by the district court and a request to the court of appeals to permit the appeal were not met (Government Brief, p. 12). Since the courts permit substantial compliance with these technicalities, the district court findings made in its November 30, 1977 order together with respondents' action in filing a notice of appeal within ten days of the order satisfy § 1292(b) requirements.[13]

This Court has acknowledged that an order which is not appealable as a final order under section 1291 may be appealable under §1292(a)(1) if the person seeking review in the court of appeals were denied injunctive relief. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-745 (1976). Respondents were denied injunctive relief halting operation of the STUYVESANT in domestic trades and preventing future waivers. If the court's decision is considered interlocutory, not final, for purposes of appellate review, jurisdiction lies under section 1292(a)(1). *Ackerman-Chillingworth* v. *Pacific Electrical Contractors Association*, 579 F.2d 484, 489 (9th Cir. 1978), *cert denied*, 439 U.S.____, 99 S.Ct. 872 (1979); *Paceo, Inc.* v. *Applied Moldings, Inc.*, 562 F.2d 870, 878-80 (3rd Cir. 1977); *McGill* v. *Parsons*, 532 F.2d 484, 485 fn. 1 (5th Cir. 1976);

[13]Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 745 (1976) concedes that the "District Court's findings made with a view to satisfying Rule 54(b) might be viewed as substantial compliance with the certification requirement" of section 1292(b). There, the Court was unwilling to assume that the court of appeals would have exercised its discretion to hear an interlocutory appeal. In this case the court of appeals specifically acknowledged the remand decision and recognized that its decision eliminated any need to resolve further issues in the case. Under these circumstances, it is appropriate to apply Reconstruction Finance Corp. v. Prudence S.A. Group, 311 U.S. 579, 582 (1941) holding that the filing of a notice of appeal satisfies requirements that petitioners seek allowance of an appeal in the discretion of the circuit court of appeals. Since the defect is not jurisdictional, the courts have the power "to disregard such an irregularity in the interest of substantial justice."

Equal Employment Opportunity Commission v. *International Longshoremen's Association*, 511 F.2d 273, 276-77 (5th Cir.), *cert. denied*, 425 U.S. 994 (1975); *Melendes* v. *Singer-Friden Corporation*, 529 F.2d 321 (10th Cir. 1976) (availability of injunctive relief curtailed).

C. Vacating The Court Of Appeals Decision Does Not Promote Judicial Economy.

The ostensible objective of the Government's request that the Court summarily vacate the judgment is to ensure that the formalities of the appeals process be observed in every case. Such observance is an empty formality in this case since the district court intended that its decision be final, and any further district court proceedings would merely track the vacated court of appeals decision. Any premature appeal was remedied when the agency issued its decision on remand on January 6, 1979 which, according to the Government position, then made the November 30 order appealable. Judicial economy is not served by the requested action vitiating the hard work of a busy panel of judges. Nor is it consonant with those goals to permit the Government to seek and prosecute appellate review and question the procedural "defect" only after an unfavorable decision is made.

II. THERE IS NO REASON TO DISTURB THE COURT OF APPEALS DECISION ON THE MERITS.

To support its claim that the court of appeals decision raises an issue requiring this Court's attention, the Government points to the STUYVESANT's singular predicament. The prospect that this American vessel may not be employed does not signal a need for increased agency powers.[14]

[14]The STUYVESANT has employment in the Alaskan trade only through 1980 and might become idle at that time without regard to the court of appeals decision (R. 13, p. 4).

The agency has sufficient existing flexibility under section 506 to insure that Alaskan oil does not "[remain] . . . in the pipeline" because of any shortfall of tonnage.[15] The agency's response to a recent application for a section 506 waiver for operation of a subsidized vessel of comparable tonnage to the STUYVESANT in the Alaskan oil trade was to deny the request, finding that there were suitable unsubsidized vessels available.[16]

Nor is there any prospect that the nation's shipbuilding program will be undermined. On the contrary, as the court of appeals carefully explained, the decision confirming the ban against permanent operation of CDS vessels in domestic trade will permit the economic forecasting needed to stimulate private shipbuilding efforts.

The Government's suggestion that the CDS program will be weakened if waivers are not permitted is absurd. The CDS program was enacted in 1936, yet this is the first time the agency has attempted to go beyond six-month temporary waivers. In doing so, the agency explained that it was motivated by unusual circumstances and it is not expected to be a precedent for other vessels to operate in the Alaskan oil trade.[17]

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[15]Brief for the Federal Parties, p. 9, fn. 11. No reference to the record is given for statements alleging (1) that oil remains in the pipeline because ships are unavailable, (2) a causal relationship between the layup of the STUYVESANT and the closing of its shipyard. Similarly, there is no basis for any claim by Amicus Curiae Sohio Natural Resources Company that the decision below results in any inability to secure transportation for Alaskan oil.

The Seatrain Shipyard announced it was closing due to perpetual losses. Brief of Shell Oil Co. in Opposition, p. 11. The agency itself conceded that it was impossible to predict supply and demand of tankers in the Alaskan oil trade beyond 1980 (App. A at 18a, fn. 34) thus making it impossible to show a long-term need for the STUYVESANT in the trade.

[16]Boston VLCC Tankers, Inc. VI, Maritime Administration Docket No. S-636, 19 S.R.R. (Pike & Fischer) 43 (M.A., 1979).

[17]Final Opinion and Order on Remand for Reconsideration, p. 35 (Jt. App. at 627).

In its brief before this Court, the Government relies on a wholly incorrect factual premise — that the subsidy paid the STUYVESANT was fully repaid.[18] The fact is that the agency accepted a promissory note for repayment over twenty years so the STUYVESANT has *not* "disgorged its entire CDS", nor, as the court of appeals explained, is the market situation the same "as if they had built the STUYVESANT without a CDS."[19]

The court of appeals has painstakingly and correctly answered every argument suggested by petitioners and the Government on the merits. There is no reason to discard or disturb its decision. The petition for writ of certiorari should be denied.

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June 7, 1979

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[18]Government Brief, pp. 2, 13, 14.

[19]Id. at p. 14.

[EXHIBIT 1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY, Plaintiff,	:	
	:	Civil
v.	:	Action No. 77-1645
JUANITA M. KREPS, et al., Defendants.	:	
ALASKA BULK CARRIERS, INC., and TRINIDAD CORPORATION, Plaintiffs,	:	
	:	Civil
v.	:	Action No. 77-1647
JUANITA M. KREPS, et al., Defendants.	:	

ORDER

Upon consideration of the motion of plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation to amend this Court's order of November 22, 1977, which plaintiff Shell Oil Company joined in today at the status call held herein, and it appearing to the Court that all plaintiffs seek leave to dismiss from this case the claim remaining before the Court that the Secretary's decisions with respect to the STUYVESANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977, and it appearing to the Court that this remaining claim is superfluous and would

afford plaintiffs no greater relief than the remand which has already been ordered by this Court, and it further appearing that no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977,

ORDERED, that plaintiffs' motion to amend this Court's Order of November 22, 1977, be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiffs' remaining claim be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

[Filed November 30, 1977]

Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 595 F.2d 814 and set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-61a. The opinion of the district court is reported at 445 F. Supp. 1128 and set forth in the Pet. App. at 65a-95a.

JURISDICTION

The court of appeals entered judgment on February 6, 1979 and denied a timely petition for rehearing with a suggestion for rehearing en banc on March 22, 1979. (App. at 600-601.) The petition for a writ of certiorari was filed on April 30, 1979 and granted on June 18, 1979. (App. at 604.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101, *et seq.* (1976), and the Jones Act, as amended, 46 U.S.C. § 883 (1976), are set forth in the Addendum hereto.

QUESTION PRESENTED

Whether the broad contracting authority of the Secretary of Commerce under the Merchant Marine Act, 1936 includes the power to amend a construction differential subsidy contract to remove domestic trade restrictions in consideration for full subsidy repayment, where the existence of such power is supported by the legislative and administrative history of the Act and furthers the Act's fundamental policy goals.

STATEMENT OF THE CASE

The T.T. STUYVESANT is a 225,000 deadweight ton oil tanker constructed by petitioner Seatrain

Shipbuilding Corporation ("Seatrain") for petitioner Polk Tanker Corporation ("Polk") between 1972 and 1977. The vessel was constructed with the assistance of a $27.2 million construction differential subsidy ("CDS") from the federal government. In contracting for the CDS, Seatrain and Polk agreed to limit the vessel's operation in the domestic trades in accordance with Title V of the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1101, *et seq.* (1976) ("the Act").

On August 31, 1977, the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board took a series of actions that enabled the STUYVESANT to engage in the domestic transportation of Alaskan oil. Those actions included a decision to accept a full repayment of the $27.2 million CDS and, in exchange, to delete from the contract the domestic trade restrictions. The three respondent companies filed suit for declaratory and injunctive relief, contending *inter alia* that the Act does not authorize the removal of trade restrictions in consideration for subsidy repayment. The district court's decision that the Act empowered the federal officials to take the challenged actions was reversed by a divided panel of the court of appeals.

A. Statutory Framework

The Merchant Marine Act, 1936 was designed to "foster the development and encourage the maintenance" of an efficient U.S.-built, owned, manned and serviced merchant marine capable of meeting the na-

tion's defensive and commercial needs in its domestic and foreign trades.[1] Section 101 of the Act, 46 U.S.C. § 1101, articulates the Act's broad policy goals:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The Act vests in the Secretary of Commerce commensurate responsibility and authority to administer the nation's maritime functions; she is broadly charged to keep current on the entire industry and

[1] U.S. domestic trade is trade between ports in this country, its territories, districts, and possessions. U.S. foreign trade is trade between a domestic and a foreign port. *See American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 2161 (1979).

"to study all maritime problems arising in the carrying out of the policy set forth in Title I of this Act." (Sections 210-212 of the Act, 46 U.S.C. §§ 1120-1122.) The Secretary is empowered to "enter into such contracts . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the [government] to secure indebtedness. . . ." (Section 207 of the Act, 46 U.S.C. § 1117.)

The construction differential subsidy program, codified in Title V of the Act, 46 U.S.C. §§ 1151-1161, was designed to stimulate shipbuilding in the United States and to increase the number of American-owned vessels. These goals had previously been fostered by the Jones Act, 46 U.S.C. § 883, which has since 1920 reserved U.S. domestic trade exclusively for vessels built in this country, documented under U.S. law and owned by U.S. citizens.[2]

However, no similar protectionist provisions could or do attach to the operation of vessels in the nation's foreign trades. Because the cost of building ships in this country is and has historically been higher than

[2] Predecessor statutes have essentially reserved U.S. domestic trade to domestic vessels since the late 18th century. *See* G. Gilmore & C. Black, Jr., *The Law of Admiralty* 963 & n.34 and 35 (2d Ed. 1975).

that of building them abroad, simple economics would dictate the use of foreign shipyards for ships intended for the foreign trades in the absence of some equalizer. Congress supplied that equalizer in Title V: the CDS program authorizes the Secretary to subsidize the domestic construction of vessels owned by U.S. citizens and intended for the foreign trade by paying, under contracts with shipbuilders and owners, the approximate difference between the cost of domestic and foreign construction.[3]

The Secretary of Commerce and her delegees (hereinafter collectively referred to as "the Secretary") have full authority over the administration of the CDS program. Section 501, 46 U.S.C. § 1151, provides that CDS applications be submitted to the Secretary who is afforded broad discretion to determine subsidy eligibility. Sections 502 and 504, 46 U.S.C. §§ 1152 and 1154, outline the basic CDS contracting authority; that authority is expansive in accordance with the Act's multiple policy goals. Section 503, 46 U.S.C. § 1153, provides that CDS-built vessels shall be documented under the U.S. flag

[3] Title V provides two alternative methods of subsidizing U.S. vessel construction. The first method, which permits the Secretary to finance fully the construction of a vessel and contract to sell it at a reduced price, is not at issue in this case. The second method, which is discussed *supra*, was the method used by the Secretary to subsidize the STUYVESANT's construction.

throughout their useful lives and § 505, 46 U.S.C. § 1555, requires that subsidized vessels be constructed in U.S. shipyards with domestic materials. Finally, as relevant to this proceeding, § 506, 46 U.S.C. § 1156, provides that owners of vessels for which CDS has been paid "shall agree" to limit the operation of their vessels to the foreign trade. Section 506 also provides that the Secretary may, when she determines it "necessary or appropriate to carry out the purposes of this Act," permit a CDS vessel to engage in certain incidental domestic trade, or to operate temporarily in the domestic trades for six months in any year, in exchange for a partial, proportionate CDS repayment.

Title XI provides an additional method by which the federal government may assist the financing of shipbuilding in the country. Obviating the need for a shipowner to use his own credit to raise construction capital, this title authorizes the agency to provide substantial loan guarantees to finance initial construction and reconstruction costs of a vessel and a full or partial CDS repayment.

B. Statement of Facts

In 1969, when the projected international demand for tankers was rising and an imminent shortfall in tonnage was universally predicted, Seatrain commenced construction of a series of supertankers at the shipbuilding facilities of the former Brooklyn Navy Yard. Seatrain's adaptation of those facilities,

and institution and maintenance of a program to train and employ hard-core unemployeds from the Bedford-Stuy esant section of Brooklyn, attracted substantial economic assistance from the Economic Development Administration of the Department of Commerce ("EDA"), including loans of $5 million and 90% guarantees of $82 million in loans to Seatrain. (App. at 111-113.)

The third vessel in the construction program, the T.T. STUYVESANT, was constructed between 1972 and 1977. (App. at 111, 112-113.) Its construction was initially assisted by loan guarantees of $30.2 million pursuant to Title XI of the Act and a $27.2 million construction differential subsidy paid pursuant to Title V of the Act under contracts executed in June 1972. As required by § 506, the STUYVESANT's CDS contracts contained terms restricting the vessel's operation in the domestic trade.[4]

Trade conditions changed dramatically during the six years that the STUYVESANT was under construction. The 1973 Middle East conflict, the Arab oil embargo and ensuing worldwide economic problems converged to decrease drastically the demand for supertankers in the foreign trades. By 1977,

[4] *See* Construction-Differential Subsidy Contract MA/MSB-164 between the Maritime Subsidy Board and Seatrain Shipbuilding Corp., executed June 30, 1972 (App. at 439, 441); Contract MA/MSB-165 between the Maritime Subsidy Board and Polk Tanker Corporation, Article 9(b)(i), executed June 30, 1972 (App. at 481, 497-498).

the foreign tanker market that the STUYVESANT had been constructed to serve offered no prospect for its employment. However, at the same time, the domestic transportation of Alaskan oil—reserved to U.S.-built, owned and operated vessels by the Jones Act—was a thriving and undertonnaged tanker trade that sought the STUYVESANT's service. (App. at 112-113; Pet. App. at 9a-10a.)

In mid-1977, Polk secured an attractive opportunity to charter the STUYVESANT for three years to Standard Oil Company of Ohio ("SOHIO") to carry oil between Alaska and Panama and, as a result of the charter, to sell the vessel. The charter and sale were premised upon the vessel's ability to obtain release from the domestic trade restrictions in its CDS contract. (App. at 113-114.)

On August 25, 1977, Polk applied for permission to repay the $27.2 million subsidy in exchange for the permanent release of domestic trade restrictions on the STUYVESANT.[5] (App. at 523-528.) As reflected in letters to Polk dated August 31, 1977, the

[5] In July 1977, Polk applied for permission to operate the vessel in the domestic Alaskan oil trade for the three-year life of the SOHIO charter in exchange for a pro-rata subsidy repayment. Notice of the application was published in the Federal Register, and it was opposed by a number of parties. The prospect of substantial delay caused Polk to withdraw its application and propose instead the full subsidy repayment and permanent release of trade restrictions. (App. at 115-116, 507-522, 529.)

Secretary approved Polk's request for CDS repayment and trade restriction release, provided that repayment be made by a fully secured and interest-bearing promissory note, and authorized the issuance and sale of $31 million of federally-insured bonds in connection with the repayment, charter and sale transaction. (App. at 530-541.) The Secretary's approval was based upon her findings that (1) the Alaskan oil trade provided the only viable employment opportunity for the STUYVESANT, (2) the SOHIO charter, which depended upon the vessel's release from domestic trade restrictions, would improve the government's collateral position and prevent default on government-guaranteed debt, and (3) failure to approve the proposal would jeopardize the continued operation of the Seatrain shipyard, which is backed by substantial government loans and guarantees. (App. at 530.)

A closing of the various financial transactions surrounding the repayment, sale and charter of the STUYVESANT was scheduled for September 23, 1977. (App. at 117.) On September 22, 1977, the respondents filed suits against the Department of Commerce officials,[6] seeking temporary and perma-

[6] Alaska Bulk Carriers, Inc. and Trinidad Corporation filed an action against the Secretary of Commerce Juanita M. Kreps, Assistant Secretary of Commerce Robert J. Blackwell, the Maritime Administration and the Maritime Subsidy Board. In addition to Secretary Kreps and Assistant Secretary Blackwell, Shell Oil Company sued Howard F. Casey,

nent injunctive relief from their decisions concerning the STUYVESANT. The plaintiffs argued: (1) that the Secretary lacked authority to release the STUYVESANT from the domestic trade restrictions, (2) that, in any event, the Secretary had abused her discretion by failing to consider the competitive effects of these transactions, and (3) that the Secretary had not adhered to the procedures prescribed by the Administrative Procedure Act ("APA"), in violation of 5 U.S.C. § 706(2)(D). Seatrain and Polk were permitted to intervene as defendants.

A temporary restraining order was granted and subsequently dissolved when the court denied preliminary injunctive relief. (App. at 167-171.) The transactions closed on September 30.[7] As a result of

then Deputy Assistant Secretary of Commerce, and Samuel B. Nemirow, then General Counsel to the Maritime Administration.

[7] At that time, the STUYVESANT was transferred to United States Trust Company ("USTC") as owner-trustee for the new equity owner, General Electric Credit Corporation ("GECC"). The Secretary amended the STUYVESANT's CDS contract to delete the restrictions on the vessel's domestic trading, and Polk issued a fully collateralized promissory note for $27,200,000 to the Secretary in repayment of the full amount of the CDS. The note was assumed by USTC which also assumed responsibility for $60,200,000 of government-insured indebtedness on the vessel, $31,355,000 of which is indebtedness incurred at the closing through the sale of bonds. The proceeds received from the sale of the bonds were used to repay loans of $28,600,000 guaranteed by the EDA. USTC also paid Polk $32,600,000 in cash; these funds were placed in an interest-bearing certificate of deposit ac-

these transactions, (1) the Department of Commerce received a fully collateralized $27.2 million note in repayment of the subsidy; (2) Seatrain repaid $28 million of loans that had been guaranteed by EDA; (3) the STUYVESANT, which supports over $60 million of government-insured indebtedness, is profitably employed rather than standing idle in lay-up, and (4) a critical shortage of tonnage for the transportation of Alaskan oil was alleviated. (App. at 530, 570-571, 581-584.) The STUYVESANT has been transporting oil from Alaska to Panama for SOHIO since that time.

After the transaction closed, the district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from domestic trade restrictions in consideration for full CDS repayment. The court further held, however, that the Secretary had abused her discretion in failing to consider fully the competitive impact of her decision concerning the STUYVESANT. Accordingly, the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. (App. at 556-557.)

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count and secure a guarantee to GECC provided by Seatrain Lines, Inc., the parent corporation of Seatrain and Polk. USTC then bareboat-chartered the vessel to Queensway Tankers which in turn time chartered it to SOHIO for three years. (*See* App. at 116-118, 570-571.)

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss a remaining, unresolved claim and urged the entry of a final order. The district court granted this motion on November 30, 1977. (App. at 558-559.) While the Secretary was conducting the proceedings on remand, the plaintiffs appealed from the district court's holding that the Secretary has the authority to accept repayment and permit a ship to engage in the domestic trade. (App. at 560-561.)[8]

Prior to oral argument in the court of appeals, the Secretary invited public comment upon the issues that the district court had directed her to consider[9] and issued a reconsidered decision on January 6, 1978. That decision examined the Alaskan tanker market in detail, explained the market need for the STUYVESANT's services during the three years of the SOHIO charter, and concluded that the competitive effect of accepting CDS repayment under the terms earlier approved and of allowing the STUYVESANT to engage in the Alaskan oil trade is

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[8] In their brief on the petition for certiorari, the federal parties sought the summary vacation of the judgment of the court of appeals on the ground that the November 30 order was not a final order under 28 U.S.C. § 1291 (1976) and that the court therefore lacked jurisdiction over the appeal. The petitioners have not raised, and do not independently brief, that issue. However, the petitioners fully support, adopt and incorporate by reference the position on the jurisdictional issue set forth comprehensively in the merits brief contemporaneously filed by the federal parties.

[9] 42 Fed. Reg. 62025 (1977).

"none or minimal." (App. at 566-599.) As a result, the Secretary affirmed her earlier approval of the repayment, charter and sale transaction. (App. at 568-569.)

A divided panel of the court of appeals reversed the district court's decision. Interpreting the Act to earmark permanently subsidized and unsubsidized vessels for "two completely separate competitive areas" (Pet. App. at 50a), the panel majority concluded that the Secretary's action is unauthorized by the Act, implicitly prohibited by § 506, and contrary to the Act's overall purposes. Judge Bazelon dissented, noting that neither the legislative history of § 506 nor the Act's policy objectives warrant the panel majority's disregard of the Secretary's interpretation of her powers under the Act.

SUMMARY OF ARGUMENT

The departmental action challenged in this case comports with a relatively longstanding, consistent and principled interpretation of the Secretary's authority under the Act. That interpretation has been brought to the attention of Congress which has not only approved but also facilitated the exercise of the disputed power. Under those circumstances, the federal courts are obliged to defer to the administrative construction in the absence of "compelling indications" that it is incorrect. No such indicia of error on the Secretary's part are present here. Rather, an

analysis of the language, legislative history and policy objectives of the Act demonstrate the validity of the historic agency interpretation and of the Secretary's 1977 decision to allow the STUYVESANT to enter the domestic trade.

The Act entrusts expansive discretionary contractual authority to the Secretary. That authority includes the entire administrative power to make, amend and terminate CDS contracts under Title V. The restriction on a CDS vessel's operation in the domestic trade is a provision in the CDS contract, exacted as a *quid pro quo* for the subsidy payment by the government. In the absence of some statutory prohibition, the Secretary is amply empowered to amend or delete the provision in consideration for full CDS repayment.

No such statutory prohibition can be found in the Act. Although § 506 imposes conditions on the temporary and incidental operation of CDS vessels in the domestic trade, it does not address the trading opportunities open to a vessel that has remitted its CDS in full to the government. The logic of the statutory provision does suggest, however, that any trade restrictions that attach as a condition of the subsidy's receipt should be removed in consideration for its full repayment, if the Secretary finds that such action would further the purposes of the Act.

An analysis of the Act's legislative history plainly establishes that result as the intention of the framers

of the Act. Indeed, multiple bills proposed prior to the Act's passage, statements in the relevant Congressional reports, the comments of the Act's pioneers, including Senators Black, Copeland and Guffey, and the original language of § 506 all expressly contemplated and approved the permanent release of the trade restrictions upon full subsidy repayment. Congress perceived that a vessel that retains its subsidy and a vessel that remits its subsidy occupy different competitive postures. The potential for unfair competition posed by a vessel that continues to enjoy the full economic benefits of subsidy merits restrictions on its domestic trading. No such restriction is warranted, however, for a vessel that has repaid its subsidy and has thus been placed on a parity with all other unsubsidized vessels.

A 1938 amendment to § 506 resulted in the deletion of the language describing the Secretary's permanent release authority. That amendment, however, was enacted only to clarify the requirement of partial CDS repayment in exchange for temporary or incidental domestic trading by a CDS vessel. The contemporaneous history provides no indication that any member of Congress understood or intended that amendment to deprive the Secretary of the power at issue here. Rather, it establishes that the Congress intended to effectuate no fundamental change in the section's original purpose and thus left intact the authority extended in 1936.

The Department has consistently interpreted the Act to authorize the release of domestic trade restrictions upon full CDS repayment. It first exercised the authority in 1964 in response to a request by Grace Line that the agency amend CDS contracts on two of its vessels to delete the domestic trade restrictions in exchange for full CDS repayment. At that time, the agency decided and the Comptroller General agreed that no provision of the Act, including § 506, prohibited the exercise of that authority. That interpretation has been consistently, albeit sparingly, reaffirmed by the agency in the intervening years. Congress has taken no steps to curb that authority. Instead, Congress knowingly approved the interpretation and promoted the exercise of the Secretary's permanent release authority in its 1972 amendments to the Act.

The Secretary's 1977 decision to release the STUYVESANT from domestic trade restrictions served all of the Act's multiple purposes, including the protection of unsubsidized owners from unfair competition. The Secretary's decision deployed an otherwise unmarketable vessel to the undertonnaged Alaskan oil trade, protected the investments of the government in its merchant marine, and contributed significantly to the existence of domestic shipbuilding and repair facilities. These actions respond directly to the Act's overriding and fundamental goals of fostering and maintaining an efficient national merchant marine.

The respondents seek, and were allotted by the court of appeals, a permanent monopoly that Congress never awarded them. The Act does not insulate the respondents from fair competition with domestic vessels in the coastwise trades. It extends them no license to exploit a demand/supply imbalance in the domestic trades when an American-built, owned and operated vessel can trade on a parity with them rather than stand idle in lay-up. The decision below undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades. The judgment of the court of appeals should be reversed.

ARGUMENT

THE MERCHANT MARINE ACT, 1936 AUTHORIZES THE SECRETARY OF COMMERCE TO AMEND A CONSTRUCTION DIFFERENTIAL SUBSIDY CONTRACT TO RELEASE DOMESTIC TRADE RESTRICTIONS UPON A VESSEL IN EXCHANGE FOR FULL SUBSIDY REPAYMENT.

A. Introduction

The decision of the Secretary in August 1977 to accept full CDS repayment and, in exchange, to delete the provision restricting domestic trading from the STUYVESANT's CDS contracts was not a unique or unprecedented event. While the confluence of economic factors that prompted and support her decision were extraordinary, the power that she exercised is

one that the Secretary of Commerce has traditionally interpreted the Act to grant. That consistent departmental interpretation had served as the basis for a series of similar decisions by the Secretary over the last fifteen years, had been well known within the maritime industry, and had been brought to the attention of and ratified by Congress prior to its invocation in connection with the STUYVESANT.

Only two events related to the STUYVESANT's release, charter and sale transaction are unprecedented. First, the corporate respondents—who own or operate vessels in the domestic Alaskan oil trade —sought to preclude a new competitor from the important Alaskan oil trade by challenging the Secretary's longstanding interpretation of her powers. Second, in concluding that the Secretary lacks the exercised authority, a divided panel of the court of appeals awarded the unsubsidized Jones Act owners a novel permanent monopoly in the domestic trades.

In declaring the Secretary's actions beyond her statutory authority, the panel majority concluded that the permanent removal of domestic trade restrictions on a CDS-built vessel is not authorized by any provision of the Act, is implicitly precluded by § 506, and is contrary to the overall purposes of the Act. The discussion below demonstrates that each of the conclusions is erroneous, for (1) the Act amply empowers the Secretary to take the action challenged here; (2) § 506 does not bar the permanent

removal of trade restrictions; and (3) the action is fully supportive of and consistent with the congressional policy expressed in the legislative history and the structure of the Act, including § 506 itself.

B. The Act Amply Authorizes the Secretary's Challenged Action.

The Secretary's authority to take the challenged action derives from the broad contracting authority granted her under the Act and, in particular, Title V. No provision of the Act authorizes *in haec verba* the deletion from a CDS contract of terms restricting the domestic trading of a vessel built with CDS assistance in exchange for full CDS repayment. That omission, however, does not deny the Secretary that amendatory authority where such a power is included within the broader authority afforded by the Act. An analysis of the Act discloses an expansive grant of contractual powers to the Secretary that amply authorizes her decision concerning the STUYVESANT.

The Act entrusts to the Secretary the formidable obligation to effectuate the policy goals set forth in Title I. That title declares a national policy of bolstering domestic shipyards, and fortifying and increasing the number and competitive abilities of Jones Act vessels in both the domestic and foreign trades. To that end, §§ 210-212 of the Act charge her with the responsibility for studying, keeping up to date, taking action, and making recommendations on every facet of the international shipping industry.

The discretionary powers afforded the Secretary under the Act are as broad as the duties imposed upon her. At the Act's inception, Congress articulated and explained its intent to grant broad authority to the Act's administrators:

> The [agency] is given a considerable amount of discretion in the solution of its problems. . . . Shipping is a business of a highly competitive and constantly changing nature, and its governmental contact must be given the power of prompt decision in dealing with situations as they arise.[10]

That congressional judgment is reflected in both the general authority granted the Secretary under the Act, and in the more specific powers afforded her under Title V.

Section 207 grants the Secretary the type of broad contractual power necessary to carry out her statutory responsibilities under the Act. Section 207 empowers the Secretary to "enter into such contracts, upon behalf of the United States, . . . as may, in [her] discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve or improve the collateral held by the [government] to secure indebtedness. . . ."

Pursuant to Title V, the Secretary exercises the entire administrative authority over the CDS program. Although the statute establishes requirements

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[10] S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935).

for eligibility, maximum subsidy percentage and place of vessel construction, it entrusts the program's implementation and the many-faceted economic judgments to the Secretary's discretion. Section 504 confers upon her the full power to make CDS contracts, and that section has been recognized in reorganization plans, correctly we submit, to include the related authority to amend and terminate such contracts.[11] The Secretary's CDS contracting authority entails the right to include terms to protect the interest of the United States, and is qualified only by the requirement of §§ 501(a) and 504 that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent *expressly* required by law." (Emphasis added.)

The domestic trade restrictions from which the STUYVESANT was released were a provision in its CDS contracts. The Secretary's contractual powers under the Act embrace the ability to amend the contract to delete those terms in consideration for subsidy repayment, unless the existence of such authority

[11] Reorganization Plan No. 21 of 1950, 64 Stat. 1273, 1274-1275, § 105(1). *See also* Reorganization Plan No. 7 of 1961, 75 Stat. 840, 842, § 202(b)(1).

The courts have recognized that the authority to amend contracts is inherent in the authority to contract:

> "In general, an officer authorized to make a contract for the United States has the implied authority thereafter to modify it, particularly where, as here, it is in the best interests of the United States to do so." *Whitman* v. *United States*, 110 F. Supp. 444, 450 (Ct. Cl. 1953).

is otherwise expressly denied by the Act or inconsistent with its overall purposes and policies. "[T]he Secretary . . . has broad discretionary authority to deal with the everchanging technological and economic conditions of the commercial shipping industry, as long as [her] actions are reasonable and consistent with the 1936 Act." *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1079 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976).

The district court and the dissent below concluded that the Act's grant of contractual powers includes the amendatory authority at issue here.[12] The panel majority refused to interpret similarly the Secretary's rightful authority under the Act. That refusal is not based on a finding that the Act expressly precludes the contested power: *All opinions below agree that the Act contains no provision that expressly prohibits the permanent release of trade restrictions on a CDS-built vessel.* Nor is the refusal ultimately premised on the content of either or both § 207 or § 504.

[12] As the district court and the dissent recognized, and as we discuss in detail *infra* at 61-67, the content and history of § 1104(a)(3) of Title XI of the Act reveal Congress' knowledge, approval and facilitation of the authority challenged here and thus provide substantial, additional support for the Secretary's action. The opinion of the panel majority states that the district court and the petitioners relied upon § 1104(a)(3) as an additional "source" of authority for the Secretary's action. That treatment of § 1104(a)(3) mischaracterizes both the district court's conclusions and the petitioners' arguments.

Rather, the panel majority's crabbed interpretation of these provisions is squarely premised on its interpretation of § 506 of the Act. Prior to examining the sections of the Act discussed above, the panel majority determined that § 506 impliedly bars the permanent release of trade restrictions on a CDS-built vessel. Proceeding from the premise that § 506 constitutes an implicit but specific bar to the action, the panel majority concluded that the more general grants of authority contained in §§ 207 and 504 were insufficient. The conclusion may flow logically from the premise upon which it was based. But that premise is erroneous, as an examination of § 506, its legislative history and its administrative interpretation demonstrates.

C. Section 506 Poses No Bar to the Permanent Release of Trade Restrictions in Consideration for CDS Repayment.

1. *The Language and Logic of § 506 Are Consistent With the Secretary's Action.*

Section 506 [13] of the Act requires owners to agree to operate their vessels in the foreign trades as the

[13] Section 506, as amended, 46 U.S.C. § 1156 (1976), states in full:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

quid pro quo for CDS payment. That agreement is not absolute. Rather § 506 explicitly envisions a CDS vessel's routine involvement in domestic trade incidental to foreign trade in exchange for a proportionate subsidy repayment. In addition, § 506 expressly contemplates that a CDS vessel may spend six months of every year, and thus half its economic life, in direct competition with unsubsidized vessels in the domestic trades. The opportunity for such temporary domestic trading is conditioned upon the owner's

remittance of a proportionate amount of subsidy, and the Secretary's determination that the temporary transfer is "necessary or appropriate to carry out the purposes of this Act."

Section 506 is silent on the trading opportunities available to a vessel that once received, but has remitted in full, its subsidy. The provision's focus is more narrow: It addresses only the restrictions that attach as a condition of subsidy receipt and limit the trading opportunities of a vessel that still retains the financial benefits of the subsidy. The language of § 506 simply does not purport to address the conceptually distinct issue of full CDS repayment and permanent trade restriction release.

The panel majority reasoned that the absence of an express grant of such authority indicates a congressional intent to deny the Secretary that power. This conclusion flows from the panel majority's view that the purpose of § 506 is to forge a permanent barrier between Jones Act vessels that have never been subsidized and Jones Act vessels that were at any time subsidized, regardless of subsidy repayment. According to the opinion, "payment of the subsidy stamps indelibly the character of the ship then and thereafter" (Pet. App. at 14a), and marks "the vessel's permanent dedication to U.S. foreign trade." (*Id.* at 16a.) Thus, the panel reasoned, any permissible domestic trading by the vessel subsequent to subsidy receipt is necessarily an exception to § 506's general rule. Designating the incidental and tempo-

rary domestic trade allowed by § 506 as express exceptions to the general rule, and invoking the doctrine that enumerated exceptions are exclusive, the panel majority concluded that the permanent release of domestic trade restrictions is implicitly barred by § 506.[14]

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[14] The panel majority offered one additional ground in support of its conclusion. Assuming that a finding of market need is an essential prerequisite to the Secretary's approval of a six-month temporary waiver, the panel majority concluded that the Secretary's professed inability to project need in any given market over the 25-year economic life of a tanker militates against the existence of permanent waiver authority. (Pet. App. at 16a-19a.)

The assumption that need is an essential finding for six-month waivers is not supported by the Act itself. Section 506 does not designate market need as the *sine qua non* of temporary waivers, but instead permits the Secretary to exercise the temporary waiver authority when she deems it "necessary or appropriate to carry out the purposes of this Act." Indeed, Congress failed to include in § 506 a requirement proposed in early drafts of the bill that would have conditioned the ability to repay CDS and obtain release from trade restrictions upon a finding of market need or inadequate service. *See, e.g.*, S. 2582, § 504(2), 74th Cong., 1st Sess. (as amended and reported May 24, 1935). The discretionary decision concerning what action "is necessary or appropriate to carry out the purposes of the Act" involves a much broader consideration and weighing of the Act's multiple policy objectives than the panel majority recognized. Market need may well be one appropriate consideration in the Secretary's decisionmaking process concerning temporary waivers under the statute, but it is neither a critical nor a dispositive finding.

Thus the Secretary's inability to make long-term projections of market need is not a decisive factor here. The factor may merit the attention and consideration that it overtly

While superficially neat, the panel majority's reasoning is fully unsatisfactory upon reflection. Section 506 belies the notion that Congress ever intended to establish an absolute and immutable barrier between subsidized and unsubsidized vessels. Indeed the provision itself condones the relatively routine and repeated presence of CDS vessels in the domestic trades. The logic of § 506 argues that Congress intended not to prohibit competition between subsidized and unsubsidized vessels, but to establish a method for assuring that all such competition would be fair. Insofar as incidental domestic trading is concerned, § 506 regards a proportionate subsidy repayment adequate to achieve fairness. Insofar as temporary domestic trade is concerned, § 506 declares a limitation on the time period, the Secretary's approval, and a proportionate CDS remittance sufficient to meet that goal.

The allowances for incidental and temporary trade both assume the vessel's retention of the direct financial advantages of its subsidy. Those exceptions do not address, and thus cannot by implication proscribe, the domestic trading opportunities available to a CDS-built vessel that has disgorged its subsidy to the

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received in the Secretary's reconsidered decision below. However, to the extent that § 506's description of the discretion involved in granting temporary waivers elucidates that applicable to permanent release, the statute approves the broad consideration of the facts and circumstances surrounding the STUYVESANT that led the Secretary to decide initially, and later to affirm her decision, to accept permanent repayment and to release domestic trade restrictions in this case.

government. The full remittance of CDS strips a vessel of the characteristics of the subsidized fleet and places it on equal footing with the unsubsidized fleet. The return of the CDS deprives the vessel of the government assistance that permits a subsidized vessel to trade profitably in the foreign trade. The repayment of the subsidy imposes the entire construction cost of the vessel upon its builder and owner, and thus places it on a partiy with its unsubsidized counterparts. The vessel that remits its subsidy cannot logically be equated with a vessel that continues to enjoy the substantial and direct economic benefits and trading opportunities that subsidized construction entails.

Moreover, to the extent that it inferentially offers guidance on the question of the permanent release authority, § 506 appears to support the existence of such a power in the Secretary. Agreeing to the domestic trade restrictions is the owner's consideration for the government subsidy. The Secretary's discretionary approval and a proportionate CDS repayment are sufficient under the statute to permit a subsidized vessel to spend half of its economic life in the domestic trades. The logic of the temporary trade allowance suggests rather forcefully that all trade restrictions that attach as a condition of the subsidy's receipt should, in the Secretary's discretion, be terminated in consideration for full CDS repayment. And the legislative history of the provision confirms the integrity of that logical inference.

2. *The Legislative History of § 506 Demonstrates a Congressional Intent to Permit the Permanent Release of Trade Restrictions Upon Full CDS Repayment.*

The relevant legislative history, which includes the Act's pre-enactment history and 1938 amendment,[15] supports two conclusions. First, the Act's framers plainly contemplated, intended and did entrust to the Secretary the authority to release domestic trade restrictions in return for full subsidy repayment. Second, in amending the Act in 1938, Congress articulated no intention to undermine or eliminate that authority. To the extent that the early legislative intent can be discerned, it endorses the Secretary's challenged actions.

a. *The Pre-Enactment History*

The Merchant Marine Act, 1936 replaced an indirect subsidy program with a program of direct subsidies to vessels and operators in the foreign trade. The impetus for the legislative reform was an address delivered to Congress by President Roosevelt in March 1935. The President's address communicated his belief, shaped by an investigative report prepared by a special Senate Committee chaired by

[15] As discussed in some detail *infra* at 61-67, Congress' legislative efforts in this area during the last decade evidence an awareness and approval of the Secretary's authority to release trade restrictions in exchange for CDS repayment and thus are also of significant assistance in resolving the question posed in the instant case.

then Senator Hugo Black[16] and a similar report prepared by the Postmaster General,[17] that the federal loan program for shipbuilding and mail subsidy program in effect at the time had been soundly abused and concededly unsuccessful. To enhance the nation's competitive position and stimulate shipbuilding in American yards, the President recommended the replacement of those indirect subsidy programs with legislation providing direct construction and operating subsidies to vessels and operators in the foreign trade.[18]

The Black Report, which President Roosevelt transmitted to Congress with his address, chronicles in some detail the multiple problems that had arisen in the administration of the mail subsidy program. That program, which had existed in some form since the mid-19th century,[19] provided federal financial assistance to U.S. foreign trade vessels by remunerating them for transporting U.S. mail. One abuse of the program highlighted by Senator Black was the diversion of mail pay funds from use in the foreign trades to use in the domestic trades by operators simultaneously engaged in both trades, a practice

[16] Investigation of Air Mail and Ocean Mail Contracts, S. Rep. No. 898, 74th Cong., 1st Sess. (1935).

[17] H.R. Doc. No. 118, 74th Cong., 1st Sess. at 3-19 (1935).

[18] H.R. Doc. No. 118, 74th Cong., 1st Sess. (1935).

[19] *See* G. Gilmore & C. Black, Jr., *supra* n.2, at 963-966.

which he concluded unfairly discriminated against U.S. operators not eligible for mail pay.[20]

Sensitive to the problems confronting the American merchant marine, the Black Report outlined a remedial legislative plan that recommended separate and direct operating and constructions subsidies. The Report describes the purpose and procedure of the proposed construction subsidy program as follows:

> The purpose of a construction subsidy is to increase the building of ships for foreign trade in American yards by equalizing the cost to American citizens of constructing them in American yards and placing them in operation on foreign trade routes with the costs of constructing the same ships in foreign yards and placing them in operation upon the same routes. The present system of construction loans should be abolished, but the ship operators should be free to borrow from governmental agencies (other than the United States Shipping Board, whose power to make loans should be abolished) upon equal terms and conditions with other private enterprise. The construction subsidy should equal in amount the difference between the cost of similar first-class construction in that foreign yard where construction by the operator is, in the opinion of the agency administering the subsidy, most economically practicable plus an amount equal to that required to place the vessel in operation at a point equal in advantage to that point where it will be placed in operation by an

[20] S. Rep. No. 898, *supra*, n.16, at 14-16.

> American yard without added cost to the operator and the reasonable cost of American construction.
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> * * * *
>
> *No vessel, the construction of which is subsidized, should be permitted to operate other than in foreign trade, except with the consent of the agency, and the agency should specifically be denied authority to consent to such operation until there shall have been repaid an amount which bears the same proportion to the construction subsidy theretofore paid as the remaining economic life of the vessel bears to its entire economic life.*[21]

The President's address, the Postmaster General's Report, and the Black Report prompted the presentation of identical bills in the House and Senate on April 15, 1935. Consistent with Senator Black's recommendation, the Act's original sponsors—Senator Copeland, then Chairman of the Senate Commerce Committee, and Judge Bland, then Chairman of the House Committee on Merchant Marine and Fisheries—proposed a program of direct construction subsidies to U.S. foreign trade vessels. Section 504 of these bills[22] authorized the Act's administrators to consent to domestic trading by a CDS vessel, either permanently or temporarily, in exchange for the vessel own-

[21] *Id.* at 43-44. (Emphasis added.)

[22] S. 2582, 74th Cong., 1st Sess. (1935); H.R. 7521, 74th Cong., 1st Sess. (1935).

ers' secured agreement to make a proportionate subsidy repayment.

The House passed its version of the 1936 Act in 1935. Section 506 of the bill enacted by the House [23] authorized the temporary and permanent transfer of subsidized vessels to domestic trade. The House Report that accompanied the bill explained that it expressly contemplated domestic trade by vessels constructed with subsidy assistance:

> The Authority may, on certain conditions, consent to the operation of such a vessel in the domestic trade in which case the amount of the subsidy shall be repaid to the United States proportionately in accordance with the formulas prescribed in Section 506(b).[24]

The Merchant Marine Act did not pass the Senate in 1935. The multiple bills that were presented during the pre-enactment period, and the reports that accompanied them, indicate that the most debated aspect of the CDS repayment issue in the Senate was the extent to which joint domestic and foreign trading would be permissible.[25] As originally proposed and passed by the House, the legislation permitted a subsidized vessel to alternate virtually at will between the foreign and domestic trades. The ability to transfer from one trade to the other was conditioned only upon a percentage subsidy return, the amount of which was tied to the vessel's annual earnings in each trade.

[23] H.R. 8555, 74th Cong., 1st Sess. (introduced by Rep. Bland on June 19, 1935).

[24] H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935).

[25] *See* S. Rep. No. 1721, 74th Cong., 2d Sess. 15 (1936).

Such unrestricted joint coastwise and foreign trade apparently smacked too much of the discredited ocean mail contract system to satisfy the Senate. The language of the early provisions would have allowed the owner of a vessel, who retained the bulk of the financial assistance afforded him to compete in the foreign trades, to skim the cream of the domestic trade and return to the foreign trade to suit his wishes. And, because the amount of subsidy repayment was tied to the vessel's comparative earnings in the two trades, it would have served the subsidized operator's interest to charge less in the domestic trades. Thus, unrestricted joint trade by a subsidized vessel was perceived to carry a significant potential for disadvantaging the unsubsidized fleet.

Section 506 of the bill originally introduced and reported in March 1936 [26] by Senator Copeland responded to this problem by delimiting non-incidental, temporary domestic trade by a subsidized vessel to "emergency" three-month periods. Nonetheless, the bill continued to permit a subsidized vessel's permanent return to the domestic trade upon agency consent and subsidy repayment.

[26] *See* S. 3500, 74th Cong., 2d Sess. (Committee Print, March 3, 1936).

An alternative bill, introduced by Senator Guffey in February 1936,[27] similarly distinguished between the availability of temporary transfers and permanent trade restriction release. Senator Guffey's comments communicate the view of the act's drafters that temporary transfers entail problems of fairness not posed by permanent trade restriction release accompanied by full subsidy payback.

Senator Guffey explained the logic of § 27 of his bill as follows:

> Section 27: This section prohibits the operation of a vessel constructed with the aid of a subsidy for foreign service to be operated jointly in the foreign service and in the intercoastal service. *Provision is made, however, for the transfer of such vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy. This section also provides that the Commission may permit the transfer of a vessel constructed for the foreign service with the aid of a subsidy to the intercoastal service temporarily, for a period not to exceed 3 months, provided an actual emergency exists.* It is believed that under this act the occasion for such transfers will seldom, if ever, arise. Foreign services are being subsidized in order that foreign-flag competition may be effectively met.

[27] *See* S. 4110, 74th Cong., 2d Sess. (1936).

> Intercoastal and coastwise services are developed under the United States flag and are not hampered by foreign-flag services. Any confusion of such services with foreign subsidized services under the United States flag will result, as has been shown in the past, in an unfair advantage of the subsidized lines over the intercoastal and coastwise lines who are competing with each other without the aid of a subsidy. Such unfair advantages may come about by permitting the foreign-service subsidized line to engage, either directly or indirectly, in the coastwise or intercoastal business.[28] (Emphasis added)

He explained additionally the identical purpose of the parallel provision of Senator Copeland's bill:

> The first paragraph thereof states that, except as later provided, no vessel on which a subsidy has been paid shall be operated in other than foreign trade unless the unamortized construction differential is repaid to the Authority prior to transfer to other than foreign service, except in emergencies for periods not exceeding 3 months.[29]

Section 506, as ultimately enacted in 1936, contained the essential terms of Senator Guffey's bill. The original provision stated in full:

[28] Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110, and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 133 (1936).

[29] *Id.* at 124.

It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding costs of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period and such period shall not exceed three months.[30]

[30] Pub. L. No. 74-835, c. 858, § 506, 49 Stat. 1999 (1936).

Responsive to the Senate's concerns regarding the dangers of unrestricted joint foreign and domestic trade, this provision restricted non-incidental temporary domestic trading by subsidized vessels to emergency transfers of no longer than three months. At the same time, however, the provision contemplated and permitted a once-subsidized vessel to return permanently to the domestic trade upon the consent of the agency and an agreement to repay in full its unamortized subsidy. Originally recommended by Senator Black and subsequently proposed by both Senators Copeland and Guffey, the option of a permanent return to the domestic trades in exchange for subsidy repayment was an intentional and integral feature of § 506 of the 1936 Act.

b. *The 1938 Amendment*

In 1938, Congress amended § 506 to read essentially as it does today.[31] The amendment effected three relevant changes in the substance of the provision. First, it clarified the circumstances under which a proportionate subsidy repayment was required. While the original § 506 did not clearly mandate a CDS remittance for incidental or emergency temporary trading, the amended § 506 plainly communicates that obligation. Second, it eliminated the requirement of an emergency for, and the three month limitation on, temporary domestic trading by CDS

[31] Pub. L. No. 75-705, § 18, 52 Stat. 958 (1938).

vessels, and authorized temporary transfer for a maximum of six months in any year. Third, it deleted the language describing the Secretary's permanent release authority.

Although the panel majority tentatively recognized the clear intent of the enacting Congress to permit permanent release of trade restrictions in consideration for CDS repayment, it concluded that the 1938 amendment eliminated that authority. In so reasoning, the panel majority gleaned from the 1938 amendment an intent contrary to that articulated by Congress itself. The 1938 amendment did not diminish the Secretary's contractual powers under Title V but instead confirmed that § 207 extends to the Act's administrators "all the general and implied powers of a business corporation." [32] While the 1938 amendment indisputably resulted in the deletion of the language describing the Secretary's permanent release authority, *the contemporaneous legislative history provides no indication that any member of Congress understood or intended the amendment to eliminate that authority.* Indeed, the legislative history confirms that Congress did not confront, and thus did not intend to eliminate, the Secretary's authority to take the action challenged here. The deletion of the descriptive language was at most the unexplained result of a congressional purpose to effectuate the first two of the three changes made in 1938.

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[32] H.R. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

In 1937, Joseph P. Kennedy, then Chairman of the Maritime Commission, proposed a series of revisions to the 1936 Act. His recommendation included a proposal to rewrite § 506 which he believed necessary to eliminate "ambiguities and confusion" in the original proposal. Mr. Kennedy's remarks on the legislation in congressional hearings included the following explanation of the proposed § 506 amendments:

> "Section 506 has been entirely rewritten to remove ambiguities and confusion. The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine.
>
> As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.

If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year. If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be determined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy.

It is believed that the section as rewritten will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.[33]

The panel majority laboriously dissected the first paragraph of Mr. Kennedy's comments to extract an intention on his part to foreclose all domestic trading by CDS-built vessels with the exception of the enumerated incidental and temporary options. In order to discern this intent, the opinion first concluded that the original § 506 was arguably unclear on the question of permanent waiver authority. It then labeled that issue as the ambiguity upon which Mr. Kennedy centered and inferred from his comments a purpose to foreclose the opportunity for permanent

[33] Amending Merchant Marine Act, 1936: Hearings on H.R. 8352 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d and 3d Sess. 8-9 (1937-1938).

trade restriction release. Finally, the panel majority perfunctorily attributed to the amending Congress the purpose it ascribed to Mr. Kennedy.

Our response is threefold. First, the notion that the original § 506 was ambiguous on the issue of permanent trade restriction release strains credibility.[34] While the provision was unclear in certain respects, the lack of clarity did not involve the availability of permanent trade restriction release. The original section plainly and expressly authorized three types of domestic trading by a CDS-built vessel: (1) domestic trade incidental to foreign trade, as defined by the exception for round-the-world voyages and island stops in the course of foreign trade, (2) permanent domestic trading upon agency consent in exchange for an agreement to repay fully the vessel's unamortized subsidy, and (3) temporary domestic trading upon agency consent for emergency, three-month periods. What the original § 506 did not make clear was whether a vessel that engaged in incidental or temporary domestic trade had an obligation to repay a proportionate part of its CDS: The original section could be read to exempt the incidental trading option from any repayment obligation and to require no CDS return for temporary transfer.

[34] The panel majority itself notes the implausibility of this notion and the fact that none of the parties below urged such a construction of the original statute. (*See* Pet. App. at 23a n.44.)

Second, when Mr. Kennedy's remarks are read in full against the text of the statute to which they refer, it is by no means clear that the majority panel correctly grasped their import. Diagramming the final sentence of the first paragraph of the comments convinced the panel that Mr. Kennedy had identified as ambiguous, and wished to clarify by eliminating, the opportunity for permanent trade restriction release in exchange for CDS repayment. Given the original provision's clarity on that point, this interpretation is curious. Moreover, were the panel majority correct in identifying Mr. Kennedy's primary objective, one would expect to find in his comments some reference to the concept of permanent trade restriction release. There is none. The next three paragraphs of Mr. Kennedy's remarks—which the panel majority ignored entirely—explain only the clarified requirement of partial CDS repayment in return for incidental and temporary domestic trade. The fact that Mr. Kennedy confined his descriptive remarks to the subject that actually was unclear in the original § 506 undermines the panel majority's view of his intent. His remarks, which the opinion below deemed so significant, are at best ambiguous.

Moreover, even assuming that Mr. Kennedy's objective was to bar permanent trade restriction release, the relevant reports of the House and Senate provide no indication that either house of Congress shared that intent. The panel majority's assertion

that Mr. Kennedy's "explanation . . . was incorporated almost verbatim into both the House and Senate reports which accompanied the bill amending § 506 in 1938 . . ." (Pet. App. at 26a) is demonstrably incorrect. The congressional reports focus, clearly and exclusively, upon the perceived need to state unambiguously the requirement of proportionate CDS repayment upon incidental and temporary domestic trade by a CDS vessel.

The Senate Report offers the following explanation of the purpose of the 1938 amendment:

> The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade or in other enumerated voyages to foreign ports, which may include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These provisions are definite. *The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the con-*

struction-differential subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months.

As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports en route to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period.

It is believed that the section, as rewritten, will result in improved administration and will protect the interests of the Government and those of the carriers, both foreign and domestic.[35] (Emphasis added.)

The Senate Report does use language similar in many respects to that used by Mr. Kennedy. Yet, most significantly, the report does not duplicate the ambiguous Kennedy sentence upon which the panel majority placed so much emphasis. Instead, the corresponding section of the report defines the primary difficulty with the original § 506 as the uncertainty whether proportionate CDS repayment is required for the incidental domestic trading permitted by the statute.

[35] S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938).

The House Report similarly explained its objective and expressly disclaimed any intent to work a fundamental change in the original § 506:

> Section 506 deals with the services upon which vessels which have been built with a construction-differential subsidy may operate and provides for the repayment of proportions of the subsidy in case the vessel is used otherwise. The section has been entirely rewritten in order to remove ambiguities arising from the method of describing the services other than foreign. *As rewritten the section clearly sets forth the obligation of the owner to use the vessel in foreign trade, and, if the vessel is operated in the domestic trade on certain definitely stated services, to repay certain proportions of of the subsidy. If the vessel is used, with the consent of the Commission, in the domestic trade in services other than those enumerated, the obligations of the owner to repay part of the subsidy are clearly defined.*
>
> *No fundamental change in the original purpose of the section has been affected.*[36] (Emphasis added.)

[36] H.R. Rep. No. 2168, *supra* n.32, at 21.

These reports join in identifying the problem that prompted the amendment as the lack of clarity on the repayment requirement for temporary and incidental transfers. They contain none of the ambiguous language upon which the panel majority seized to ascertain Mr. Kennedy's intent. The reports indicate that Congress perceived the amendment to have two, and only two, purposes—the expansion of the temporary waiver option and the clarification of the requirement of CDS repayment for both incidental and temporary transfers. They neither state nor intimate that Congress perceived its amendment as affecting in any way the permanent release authority extended the agency in 1936.

The unsubsidized operators who testified against the proposed 1938 amendment apparently shared Congress' ignorance that the amendment could ever be read to foreclose the permanent release of trade restrictions. Indeed, one unsubsidized operator urged Congress to delete § 506 entirely and enact instead a provision incorporating what the majority panel extended here—the permanent bar from the domestic trade of a vessel originally built with CDS, regardless of CDS repayment. Edgar C. Luckenbach, the president of an unsubsidized carrier, testified in 1937 in vigorous opposition to both the original § 506 and the 1938 amendment. He proposed instead that "in the interest of the intercoastal service as a whole § 506 of the bill 3078 should be deleted from the bill and an amendment substituted *prohibiting subsidized vessels and vessels which have at any time been subsidized from the intercoastal service.*" [37] Mr. Luckenbach's recognition of two distinct categories of vessels once assisted by CDS—those that retain their subsidy and those that have repaid their subsidy—is unmistakable. But Congress did not honor this request. Instead, it enacted in 1938 an amendment that substantially expanded the temporary domestic trading opportunities of vessels that continue to enjoy the benefits of the subsidy.

A close analysis of the available 1938 history indicates that, to the extent that Mr. Kennedy may have envisioned a bar to permanent transfer, his view was neither articulated nor shared by the affected industry or the Congress. The dissent below correctly observed that "nowhere in the legislative history is there any indication that permanent waivers, apparently permissible under the 1936 Act, were expressly considered and eliminated in 1938." (Pet. App. at 55a.) (Footnote omitted.) The majority panel's interpretation of Mr. Kennedy's hearing comments—which contradicts the intent expressed by the enacting Congress and was never adopted by the amending Congress—is an extraordinarily weak basis for its conclusion that Congress effected the major statutory revision at issue here, particularly since

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[37] Amending the Merchant Marine Act, 1936: Hearings on S. 3078 Before the Senate Committee and on Education and Labor, Part I, 75th Cong., 2d Sess. at 44 (1937). (Emphasis added.)

Congress in 1938 disclaimed any intent to work a fundamental change in the section's original purpose.[38]

The language and structure of the Act militate against the conclusions of the panel majority. The early legislative history of the Act invites the Secretary's exercise of the powers challenged here and the 1938 amendment provides no tenable basis for concluding that Congress intended to revoke that invitation. The fact that none of Mr. Kennedy's contemporaries shared the views that the panel majority attributes to him casts doubt upon the correctness of its reading of his comments. That doubt is magnified upon consideration of the agency's interpretation. For, if the panel majority correctly understood the substance of his 1937 remarks, Mr. Kennedy stands as the lone dissenter to an otherwise uniform view of the Secretary's powers under the Act.

D. The Permanent Release of Domestic Trade Restrictions in Exchange for Full CDS Repayment is Supported by a Longstanding and Consistent Agency Interpretation that Congress Has Knowingly Affirmed.

The Secretary's decision to amend the STUYVESANT's CDS contracts to permit its unrestricted domestic trading in consideration for full CDS repayment comports with a reasonable, consistent and relatively longstanding agency interpretation that

[38] H.R. Rep. No. 2168, *supra* n.32, at 21.

was brought to the attention of and affirmed by Congress in 1972. This community of administrative and congressional action merited, under elementary principles of statutory interpretation, a judicial deference withheld by the panel majority. *See, e.g., Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, —— U.S. ——, 47 U.S.L.W. 4048, 4052 (December 11, 1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969).

1. *The Grace Line Precedent*

The Secretary first exercised the amendatory powers at issue here in response to an application made by the carrier Grace Line, Inc. in 1964. At that time Grace Line owned two vessels that had been converted from cargo vessels to container vessels with the assistance of CDS in the late 1950s. By 1964, Grace Line concluded that the vessels could not be successfully operated in the foreign trades. As a result, the company requested the Secretary to accept the full return of the unamortized subsidy and to amend the vessels' CDS contracts to remove the domestic trade restrictions. (App. at 172-173.)

Grace Line's request prompted the first recorded agency analysis of the question whether the Secretary has the contractual powers at issue here. The question was at that time studied and answered affirmatively by both Graydon L. Andrews, Acting General Counsel for the Maritime Administration, and the Comptroller General of the United States. In

a memorandum dated July 28, 1964, Mr. Andrews concluded that the agency possessed the discretionary legal authority to grant Grace Line's request. He offered several bases for his conclusion. First, noting that the § 506 repayment requirement for temporary trading terminates with the vessel's economic life, he analogized the Grace Line proposal to a request to "accelerate" the vessel's release from its § 506 restrictions. Second, examining the original language of § 506 and the history of its subsequent 1938 amendment, he gleaned no congressional intent to bar the permanent release of trade restrictions in exchange for the repayment of the vessel's unamortized CDS. Finally, he determined that the discretionary exercise of such authority would parallel the logic and objectives of Title V. (App. at 350-358.)

The Secretary of Commerce thereafter inquired whether the Comptroller General agreed with that interpretation of the statute. The Opinion of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964), concurred that "the Maritime Subsidy Board has the legal authority to amend the two contracts involved to remove therefrom the Section 506 provisions . . . upon repayment to the Government of the unamortized construction-differential subsidy. . . ." (App. at 172, 180.) The Opinion similarly analyzed the statutory scheme and relevant legislative history, and concluded that § 506 poses no barrier to the permanent release of domestic trade restrictions. In

addition, the Comptroller General joined the agency view that subsidy repayment eliminates the financial advantage that would otherwise warrant the restrictions, and thus supports their release:

> Under the law an American operator in the domestic service is required to build his ship in an American shipyard and is required to pay the full domestic price of his ship. *An operator, aided with a Title V construction-differential subsidy, secures his ship at a cost equivalent to a foreign price* (domestic price less the subsidy granted by the Government) *and, as a result thereof the operator is required by Section 506 to, in effect, pay the domestic price if the ship is operated in the domestic trade. This is accomplished by a repayment to the Government of the subsidy applicable to that proportion of the vessel's statutory life during which it is operated in the domestic trades. Upon the basis of the rationale for the repayment of subsidy,* it appears that if the Government receives the full benefit of its subsidy by the owner's operations in the foreign trade and the compliance with the other construction-differential subsidy contract obligations for the statutory life of the vessel, *or if, in the case of a vessel which has not reached the end of its statutory life, the unamortized subsidy is repaid to the Government, the owner should be in the same position as if he had paid the full domestic price of the vessel; that is, he should not be required to make further repayments and should not be bound to operate the vessel exclusively in foreign trade.* This conclusion appears amply supported by the

> above-quoted portions of Senate Report No. 1618, 75th Congress, 3d Session, and that the repayment of unamortized subsidy will protect the interests of the Government and those of the carriers, both foreign and domestic.

(App. at 179-180.)

The *Grace Line* opinion plainly evidences the agency's considered view of its powers under the Act. That interpretation had been consistently, albeit sparingly, reaffirmed by the Department in the intervening period before the STUYVESANT decision. The second and third such applications were prompted by the expectation that the trade route between the United States and the Virgin Islands might be reclassified as a domestic trade area.[39] In 1976 and 1977, Atlas Marine Company and Aquarius Marine Company, carriers whose CDS vessels were employed in the U.S.-Virgin Islands trade, sought the agency's conditional consent to full subsidy repayment and trade restriction release in the event of such a re-

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[39] Section 21 of the Merchant Marine Act of 1970, 46 U.S.C. § 877, excludes the Virgin Islands from the "coastwise laws of the United States until the President shall . . . declare that such coastwise laws shall extend to the Virgin Islands . . . ." Thus, for purposes of the Jones Act and the CDS program, the Virgin Islands are a foreign port. The concern of these applicants is explained by the fact that repeated legislative efforts have been made to repeal the Virgin Islands exemption over the last decade. *See American Maritime Ass'n v. Blumenthal*, 590 F.2d 1156, 1164 n.43 and 1167 & n.59 (D.C. Cir. 1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 2161 (1979).

classification. The agency's approval of the requests comports with *Grace Line*. (*See* App. at 164-165.)

In 1977, as a result of a change in trading opportunities, Wilmington Trust Company sought to obtain release from § 506 restrictions on two liquid natural gas tankers by remitting their CDS on the date of the vessels' delivery. The release was requested in that case to permit the vessels' employment in non-U.S. foreign trades, and the applicant urged that its application was theoretically indistinguishable from that made by Grace Line in 1964: "[A] party may repay CDS, in whole or in part, not only for the purpose of removing any Section 506 of the Act restriction on a vessel, but also for removing all restrictions and obligations imposed by Title V of the Act. . . ." (Rec. at Doc. 34, Exh. A at 12; *See* App. at 164-165.) The Secretary's approval of this application again reaffirmed the *Grace Line* precedent. For the fourth time, the agency followed the *Grace Line* principle that full subsidy repayment eliminates the justification for the trade restrictions and renders their release both legal and equitable.

The panel majority's deprecatory finding that "[t]he Grace Line affair . . . is no precedent for what the Agency has attempted to do here" (Pet. App. at 30a) (footnote omitted) is extraordinary. None of the three arguments offered in its support is persuasive.

The panel intimates that the absence of objection or judicial challenge to the 1964 *Grace Line* decision

undercuts its value. It is apparently true that the Secretary's approval of Grace Line's request created no industry furor, but that fact does not advance an inquiry into the duration, consistency, meaning or reasonableness of the 1964 opinion. At best the absence of prior challenge suggests that the Secretary's invocation of the permanent release authority was not deemed controversial until it involved a trade area that the respondents' here perceive as their own special reserve.

The panel majority additionally suggests that its ability to draw distinctions among the facts in the five repayment-and-release actions somehow renders *Grace Line* irrelevant. Since similar cases invariably entail factual distinctions, a finding of such differences is thoroughly unremarkable. The important question in examining agency precedent is whether the treatment of similar situations reveals a consistent principle underlying the Act's administration.

The immaterial factual differences isolated by the panel majority in no way detract from the agency's consistent, principled exercise of authority in the five permanent release cases. Over the course of the Act's administration, the Secretary has received applications to remit CDS paid to assist both initial construction costs, as in the case of the Atlas, Aquarius, Wilmington Trust, and Polk vessels, and reconstruction costs, as in the case of Grace Line.[40] Those ap-

[40] The majority panel emphasizes that, unlike the STUYVESANT, the Grace Line vessels' original construction was not subsidized. The opinion suggests that the release of trade restrictions on a vessel reconstructed with CDS is more acceptable than the same action with respect to a vessel initially constructed with CDS. It reasons that, because Grace Line's vessels were originally constructed without subsidy, unsubsidized owners took their presence in the trade into account when making construction plans, and their return to the domestic trade did not therefore thwart the expections of other domestic operators. The opinion freely admits that this view depends upon the majority panel's view of the purposes and policies of the Act. (Pet. App. at 30a-31a). We treat the panel majority's misperception of the Act's fundamental objectives at 67-75 *infra* and will not, therefore, digress here.

However, three responsive points can appropriately be made at this juncture. First, the logic of *Grace Line* is not in any way tied to or dependent upon the fact that the vessels were not initially constructed, but only reconstructed, with CDS. Second, the panel majority's suggestion that the availability of trade restriction release might reasonably depend upon the point in the vessel's life at which the CDS is paid directly undermines the opinion's central premise that § 506 restrictions attach—permanently and immutably—with the receipt of CDS. *See supra* at 26. Third, while the original Grace Line vessels were cargo vessels, the reconstructed vessels were container vessels equipped for much different service. To the extent that one made predictions concerning the domestic container vessel market, the original cargo vessels *would not* have fallen within those projections.

plications have involved both vessels newly entering commerce, such as the Wilmington Trust and Polk vessels, and vessels already plying the seas, as were the Atlas, Aquarius, and Grace Line vessels. Each time the applicant pointed to a change in trade conditions that vitiated its prior commercial plans for the vessel, offered to remit the financial advantage that it held as a result of the subsidy, and requested

a reciprocal release of § 506 restrictions. The Secretary's affirmative response to these applications has unmistakably confirmed her interpretation of her powers under the Act, reiterated her view that subsidy repayment creates the parity intended by the Act, and established an intelligent and intelligible precedent.

The panel majority questions the consistency of the *Grace Line* interpretation. While it grudgingly recognizes the consistency of the agency's approach to the five applications that it has received (Pet. App. at 34a), the panel majority claims to find an inconsistent view expressed by the agency's former General Counsel in 1970.

The 1970 memorandum considered the legality of including in the original CDS contracts for two earlier Seatrain vessels (not the STUYVESANT) a provision sanctioning future repayment and release. The memorandum reveals that its author (1) interpreted the statute to entrust to the Secretary the authority for permanent trade restriction release upon CDS repayment, and (2) counseled against the agency's making an advance, unconditional commitment to exercise that authority in contracting to pay the subsidies for any vessel. (App. at 359-363.) The memorandum explains:

> While it is acknowledged that this opinion and concurrence therein [*Grace Line*] did permit the lifting of the section 506 restriction from existing ships in a particular instance, *it would appear inconsistent with the basic purpose of CDS* to build ships for the U.S. foreign trade *to consider an application for CDS based on initial acceptance of the premise that at any time after the building of the ships, the operator might obtain a release from the section 506 restrictions by repayment of unamortized CDS.* Furthermore, since the opinion and concurrence related to the authority of the Board to amend contracts, it would be necessary to establish in any particular instance that some consideration would flow to the Government as an integral part of an amendment lifting the section 506 restrictions. *To approve an application for CDS on the basis proposed by Seatrain would, in effect, bind future Boards to exercise a discretionary authority without any regard for whether, in the future, the Government would receive adequate consideration in exchange for the lifting of the restrictions. The consequence of Seatrain's proposal, if accepted, would be to convert a matter of future exercise of discretionary authority by the Board into a present right of Seatrain, at its option, to lift the restrictions by CDS repayment.*

(App. at 362.) The memorandum thus does not question the principle of CDS repayment and trade restriction release, but deems a blind promise to exercise it at the subsidized owner's option to be inconsistent with the discretionary nature of the Secretary's power. Fairly interpreted, the memorandum is entirely consistent with the agency's views expressed on the matter since 1964.

Finally, the panel majority asserts that the analytical differences between the Comptroller General's opinion and the opinion of the district court below warrant discarding *Grace Line* as precedent. The panel appears to reason that where different but complementary approaches lead to the same conclusions, both approaches and the result are fatally suspect. The conclusion is baffling.

Grace Line assumes the existence of ample amendatory authority in the Secretary and focuses primarily on the question whether § 506 poses any bar to its exercise in connection with CDS repayment-and-permanent release. The district court found that § 506 itself offered no dispositive assistance and thus looked beyond that provision to other indicia of congressional intent—including §§ 207 and 504 of the Act, the structure and overriding policies of the Act, the administrative interpretation of the Act, and Congress' affirmation of *Grace Line* in 1972. These complementary lines of analysis led the Comptroller General and the district court to conclude identically that (1) § 506 does not proscribe the administrative action challenged here, and (2) the discretionary exercise of that authority is consistent with the Act's structure and policy objectives. The fact that two different but compatible analyses led to the same conclusion reinforces, rather than undermines, the validity of the *Grace Line* precedent.

2. *Congressional Affirmation of the Grace Line Precedent.*

In declining to defer to the agency's longstanding view of its authority under the Act, the panel majority refused to weight either the implicit or explicit congressional approval of the *Grace Line* precedent. The majority opinion asserts that the actions of Congress following *Grace Line* fail to demonstrate congressional approbation of the agency interpretation. A review of the subsequent legislative activity reveals that the panel majority was badly mistaken.

Six years after *Grace Line*, Congress amended the Act including Title V in some detail, leaving intact the agency's 1964 interpretation of its Title V powers.[41] While the 1970 history alone could dispositively support a finding of congressional affirmation, *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965) and cases cited therein, Congress' approval of *Grace Line* need not merely be implied from the 1970 amendment. For, in amending Title XI of the Act in 1972, Congress considered and expressly facilitated the exercise of the Secretary's *Grace Line* authority.

The 1972 Title XI amendments[42] were designed to improve the Act's responsiveness to the financing needs of the shipbuilding industry and to simplify the mechanics of issuing and marketing obligations. Among the proposed amendments was a new section

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[41] *See* Pub. L. 91-469, 84 Stat. 1018 (1970).

[42] Federal Ship Financing Act of 1972, Pub. L. 92-507, 86 Stat. 909.

that extended the availability of federal financing guarantees to *Grace Line* CDS repayments. As introduced in the House by the then Chairman of the Committee on Merchant Marine and Fisheries, the proposed section read:

> Sec. 1104. (a) Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> * * * *
>
> (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, *in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions*; . . . .[43]

The plain words of this proposed section note and accept the Secretary's discretionary authority to accept CDS repayment in exchange for the release of § 506 restrictions. Indeed, the section facilitated such action by authorizing the extension of government

[43] H.R. 9756, 92d Cong., 1st Sess. 7-8 (1971) (Emphasis added.)

financing guarantees to assist full subsidy repayment.

The section was ultimately not enacted in the form in which it was originally proposed. Prior to the bill's passage, the language that expressly referred to a CDS repayment made in order to obtain release from trade restrictions was omitted, leaving the more general reference to "financing, in whole or in part, the repayment of any amount of construction differential subsidy" that now appears in the Act.[44] This amendment responded to a concern expressed by the Department of Commerce that the financing guarantees should be made available *not only* for the total CDS repayments contemplated by the bill *but also* for partial CDS repayments not mentioned in the proposed section. By his October 29, 1971 letter to the House Committee chairman, the then General Counsel of the Department of Commerce explained:

> The proposed legislation would also permit the Secretary of Commerce to guarantee or to make a commitment to guarantee payment of the principal of and interest on an obligation which aids in financing in whole or in part the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. This provision in Title XI does not in any way extend or affect the application of Title V of the Act. As drafted, the language

[44] The complete text of § 1104(a)(3) is set forth in the Addendum at 20a-21a.

of the bill would preclude the use of Title XI assistance from being available for repayment of construction-differential subsidy in cases where only a partial repayment is being made. This restriction is unnecessary, and that language should be modified accordingly.[45]

In amending the bill to correspond with the Department of Commerce views, Congress explained that its purpose was to expand the coverage of the section. The explanation offered by the House Report expressly notes the *Grace Line* precedent and communicates Congress' intent to facilitate the exercise of the power through the extension of federal financing guarantees:

> Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessels from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." *In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee* questions the desirability of general legislation to deal with such an unusual situation, and *feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act.* Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act.[46]

Congress' action in connection with the 1972 amendments supports several conclusions. First, it indicates at a minimum that Congress was made aware of the Secretary's *Grace Line* interpretation and failed to take legislative action to disapprove that view. Second, the commentary in the cited report can be reasonably read only to accept and approve the existence of such discretionary authority in the Secretary. As the dissent below so aptly notes, Congress' avowed intent to effectuate no change in Title V was made against the background of its understanding that the title embraces the *Grace Line* precedent. (*See* Pet. App. at 58a.) Third, in enacting § 1104 (a)(3), Congress escalated its approval of *Grace Line* into a financing provision that actually facili-

[45] H.R. Rep. No. 688, 92d Cong., 1st Sess. 17 (1971).

[46] H.R. Rep. No. 688, *supra* n.45, at 9-10.

tates the exercise of the discretionary authority at issue here.

The pattern of administrative and congressional action that preceded the Secretary's 1977 decision concerning the STUYVESANT is entitled to great weight in the judiciary's interpretation of the Act. This Court's analysis of a similar consensus between the agency and the Congress in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-82 (1969) obtains:

> Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.

(Footnotes omitted.) *See also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). The agency interpretation must be affirmed unless it is unreasonable, *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965), or there are "compelling indications" that it is incorrect. *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977).

Judicial deference to an agency's construction of its statutory mandate is appropriate "particularly

when [the disputed agency] construction accords with well established congressional goals." *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, —— U.S. ——, 47 U.S.L.W. 4048, 4053 (December 11, 1978). As the district court and the dissent below recognized, the existence of the *Grace Line* authority in the Secretary and her exercise of that authority in 1977 on the STUYVESANT's behalf accord with and promote the fulfillment of the Act's fundamental policy objectives.

E. The Challenged Action of the Secretary Is Fully Supportive of and Consistent with the Act's Fundamental Policy Objectives.

The decision of the panel majority proceeds from its fundamental belief that the unsubsidized owner needs, is entitled by statute to receive, and has relied upon freedom from any competition with CDS-built vessels. The 40-year history of the Act contradicts this anticompetitive approach. The express and overriding purposes of the Act declare a policy of fortifying and increasing the number and competitive abilities of Jones Act vessels in both the United States domestic and foreign trades. The language and legislative history of the Act, particularly that of § 506, reveal no generalized congressional intent to bar competition between the subsidized and unsubsidized fleets but instead evince a purpose only to assure that all such competition would be fair.

Congress recognized the potential for unfair competition between subsidized and unsubsidized vessels

under circumstances where the retention of the subsidy could afford a material competitive advantage. To eliminate unfair competition, § 506 exacts the price of domestic trading restrictions for the subsidy benefit. The full disgorgement of the subsidy, however, eliminates any unfair advantage that a CDS-built vessel might otherwise have. Indeed, as the dissent below aptly observed:

> Full repayment of subsidy irrevocably places the transferred vessel on the same footing as all other ships in the Jones Act fleet, without affording an unfair advantage to the previously subsidized operator. The only conceivable harm to the Jones Act operators is an increase in competition from an additional U.S.-flag, U.S.-built vessel. I do not believe it is the purpose of § 506 in particular, or the Merchant Marine Act as a whole, to protect Jones Act operators from this type of competition.

(Pet. App. at 59a.) (Footnotes omitted.)

The panel majority misapprehends the Act and its history by reading into them a purpose never intended or expressed—the isolation of subsidized and unsubsidized vessels into two "completely separate competitive areas." (Pet. App. at 50a.) The majority created an unfounded antagonism between the Jones Act and the Merchant Marine Act, 1936, and failed to grasp their similar purposes. Neither statute was intended to insulate permanently the unsubsidized Jones Act vessels in the coastwise trade from competition by Jones Act vessels subsidized under Title V.

The two statutes combine to effectuate the "historic congressional purpose to aid shipbuilding interests" in this country. *See Pennsylvania Railroad Co.* v. *Dillon*, 335 F.2d 292, 296 n.5 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964) and *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1083 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 912 (1976). As stated in *Dillon*, the Jones Act was "not intend[ed] to insulate coastwise carriers from other domestic competition or to give them any legally protected right to be free of such competition."[47] 335 F.2d at 295-296 & n.5. And Title V of the Merchant Marine Act, 1936 does not forbid competition within the coastwise trade; it expressly permits such competition so long as it is fair.

The Jones Act reserves United States domestic trade for U.S.-built, owned and documented vessels. The STUYVESANT satisfies all requirements of the Jones Act. The Merchant Marine Act, 1936, established a system for subsidizing U.S.-built and operated vessels in the foreign trade with the express objective of increasing the overall strength of the national merchant marine. All of the Act's multiple purposes, *including the protection of the unsubsidized owner from unfair competition*,[48] were served by the Secretary's decision concerning the STUYVESANT.

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[47] Petitioners unsuccessfully challenged the standing of the plaintiffs in both the district court and the court of appeals and have not raised that issue here.

[48] At the direction of the district court on remand, the agency reconsidered its decision admitting the STUYVE-

The STUYVESANT became available to alleviate a short-fall of tonnage in the domestic Alaskan oil trade while it had been unmarketable in the United States foreign trade. The STUYVESANT remains capable of responding in a military emergency. The STUYVESANT continues to be owned and operated under the United States flag by United States citizens. The STUYVESANT is a safe vessel constructed in the United States and manned by trained, efficient United States personnel. The STUYVESANT's construction and the Secretary's financial aid to the shipyard made a significant contribution to the existence of domestic facilities for shipbuilding and repair. Finally, as an added advantage of the decision, the revenues generated by the sale and charter transaction permitted the repayment of debt guaranteed by the government and protected the collateral for the government's outstanding loans and guarantees.

The purposes of the Act are not furthered, and indeed are thwarted, by the profoundly anti-competitive view advanced by the panel majority. At the time that the Secretary agreed to amend the STUY-

SANT to the domestic trade with particular focus on the competitive impact of the vessel's entry on that trade. The agency invited and received comments from interested parties, including the respondents in this case. The conclusion reached in the agency's 37-page opinion was that the competitive effect of accepting CDS repayment under the approved terms and of allowing the STUYVESANT to engage in the Alaska trade is "none or minimal." (App. at 568-569.)

VESANT's CDS contract, the supply of unsubsidized tankers available to transport Alaskan oil was insufficient to meet Alaskan production. The Department of Commerce projected that the short-fall of supply would continue at least throughout the three years of the STUYVESANT's charter with SOHIO, and that even the STUYVESANT's employment would not fully meet the extant or expected demand. (App. 581-584.) At the same time, the supply/demand imbalance had prompted opportunistic conduct on the part of unsubsidized owners and operators. For example, despite SOHIO's expressed interest, respondent Shell Oil Company failed to make its vessels available for charter until after SOHIO completed charter arrangements with the STUYVESANT and did so at that time at rates that SOHIO averred were 60-70% above competitive market rates and "could be considered unconscionable." (App. at 162.) It is inconceivable that the Act would license the unsubsidized owner's exploiting a demand/supply imbalance in the domestic trades while an American-built, owned and operated vessel that poses no unfair competitive threat in the domestic trade[49] is relegated to layup.

[49] Initially and upon appeal, the corporate respondents additionally challenged the Secretary's decision to accept CDS repayment from Polk through a 20-year, interest-bearing and secured promissory note payable in level semiannual installments on the ground that it permitted unfair competition. The panel majority found it unnecessary to reach the issue in light of the disposition of the case. The district court

In extending such commercial privilege to the respondents, the panel majority unduly credited their dramatic claims of surprise at the Secretary's action and of reliance upon the absence of permanent competition with vessels constructed with CDS assistance in the Alaskan oil trade. The possibility of full or part time competition with CDS-built vessels has been widely recognized by the industry for years. The Comptroller General's decision in *Grace Line* was a public document published in the legal literature. In hearings on the 1972 amendments, James J. Reynolds, the President of the American Institute of Shipping explained the industry's knowledge and acceptance of the Secretary's *Grace Line* powers:

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determined that prescribing the terms and conditions of CDS repayment is a matter properly delegated to the Secretary's discretion.

Petitioners submit that the district court's resolution of this issue accords with the discretionary authority afforded the Secretary under the Act and properly recognizes the Secretary's expertise in matters of maritime finance. The remand in this action proves the practical wisdom of the district court's conclusion. The government experts at MarAd and MSB, knowledgeable in the intricacies of maritime financing and charter hire rates, examined the transaction in light of all plaintiffs' claims of unfair competition and determined with assurance that the competitive effects of the repayment terms were "minimal or nil." (App. at 589-596.) Repaying the $27.2 million over 20 years with interest from the date of the release of trade restrictions places the STUYVESANT in a competitive position comparable to any other operator servicing a construction debt.

> The bill would also authorize the use of title XI guarantee in financing repayment to the Government by a shipowner of construction-differential subsidy received in the construction of a vessel in order to free it from all restrictions imposed as a result of the subsidy.
>
> For instance, if a vessel was built with construction-differential subsidy and the owner wishes to buy out the subsidy in order to qualify it for other types of activities, the transaction could be financed under the bill so that he could buy out the subsidy and make the vessel eligible for other services which would be consistent with the objectives of the whole natural program.[50]

This spirit of industry approval of and acquiescence to the bill was reflected in the Committee Chairman's comment: "I do not believe that this is a controversial bill and am unaware of any opposition to it." [51]

The claims of reliance to which the panel majority responded are no more creditable than the claims of surprise. First, given the established *Grace Line* precedent, any reliance by an unsubsidized carrier on an immutable right to be free of permanent competition in the Alaskan oil trade from a vessel once assisted by CDS was misplaced. Second, in light of the § 506 provision for the continual, temporary pres-

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[50] Proposed Amendments to the Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. at 225 (1971).

[51] *Id.* at 193.

ence of CDS vessels in the domestic trades, any projection that failed to consider competition from CDS vessels was faulty. Third, and most important, the panel majority assumed a degree of foreseeability in the domestic shipping trade that the facts involved in this case belie. In undertaking to construct vessels in anticipation for the Alaskan oil trade, no owner or operator could have projected the volume of trade that has in fact arisen in that market. The events that swelled the demand for tankers in Alaska were as unforeseeable as those that depressed the foreign market for such vessels. (*See* Pet. App. at 9a-10a.) It is the corporate respondents' desire to reap the benefit of fortuity, rather than to protect a reliance interest, that truly underlies this litigation.[52]

The respondents, through this action, have strived vigorously to preclude the entry of a new competitor into the important Alaskan oil trade. The efforts of the respondents here parallel the requests made of Congress by unsubsidized operators in 1938. Only the result reached by the court of appeals is different. The decision of the panel majority awards the un-

[52] Despite the panel majority's protestation that recognizing the Secretary's rightful authority would result in uncertainty, the district court's judgment below actually served the interests of increased predictability. The district court's decision prompted the Secretary to undertake the promulgation of regulations to govern the future exercise of the permanent release authority. *See* 43 Fed. Reg. 51045 (November 2, 1978). That undertaking has apparently been deferred pending the final resolution of this case.

subsidized Jones Act owners the permanent monopoly in the domestic trades that Congress in the past refused to sanction.

The Merchant Marine Act, 1936—as originally enacted and amended by Congress, as interpreted by the agency, and subsequently affirmed by Congress—affords the Secretary the necessary authority to respond to the extraordinary confluence of factors that prompted and support her STUYVESANT decision. The repayment of the CDS satisfies the congressional requirement of fairness embodied in the Act. The employment of the vessel, the safeguarding of the federal guarantees and loans, and the assistance to the shipyard respond directly to the Act's overriding and fundamental goals to foster and maintain an efficient national merchant marine. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred. . . . Surely the [Secretary's] broad responsibilities . . . demand a generous construction of [her] statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (Citations omitted). The decision of the panel majority undermines the equilibrium of interests established by Congress, intrudes upon the Secretary's rightful authority, and awards the respondents an unwarranted freedom from competition in the domestic trades.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court of appeals, and hold that the Merchant Marine Act, 1936 authorizes the Secretary of Commerce to amend a CDS contract to remove domestic trade restrictions on a vessel constructed with the assistance of a government subsidy in consideration for full CDS repayment.

Respectfully submitted,

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August 16, 1979

ADDENDUM

ADDENDUM

STATUTORY PROVISIONS INVOLVED

THE MERCHANT ACT, 1936, as amended, 46 U.S.C. §§ 1101 *et seq.* (1976)

Title I, § 101 of the Act, 46 U.S.C. § 1101 ..... 2a

Title II, § 207 of the Act, 46 U.S.C. § 1117 ..... 2a

Title II, § 210 of the Act, 46 U.S.C. § 1120 ..... 3a

Title II, § 211 of the Act, 46 U.S.C. § 1121 ..... 4a

Title II, § 212 of the Act, 46 U.S.C. § 1122 ..... 6a

Title V, § 501 of the Act, 46 U.S.C. § 1151 ..... 9a

Title V, § 502 of the Act, 46 U.S.C. § 1152 ..... 11a

Title V, § 504 of the Act, 46 U.S.C. § 1154 ..... 18a

Title V, § 506 of the Act, 46 U.S.C. § 1156 ..... 19a

Title XI, § 1104(a) of the Act, 46 U.S.C. § 1274 (a) 20a

Section 27 of the MERCHANT MARINE ACT OF 1920, as amended, 46 U.S.C. § 883 (Supp. 1979) ("Jones Act") 22a

Section 101 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101 (1976) states:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for ship-building and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

Section 207 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1117 (1976), states:

> The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. All the commission's and Secretary's financial transactions shall

> be audited in the General Accounting Office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444: *Provided*, That it shall be recognized that, because of the business activities authorized by this chapter, the accounting officers shall allow credit for all expenditures shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary. The Comptroller General shall report annually or oftener to Congress any departure by the Commission or Secretary from the provisions of this chapter.

Section 210 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1120 (1976), states:

> It shall be the duty of the Secretary of Commerce to make a survey of the American merchant marine, as it now exists, to determine what additions and replacements are required to carry forward the national policy declared in section 1101 of this title, and the Secretary of Commerce is directed to study, perfect, and adopt a long-range program for replacements and additions to the American merchant marine so that as soon as practicable the following objectives may be accomplished:
>
> First, the creation of an adequate and well-balanced merchant fleet, including vessels of all types, to provide shipping service essential for maintaining the flow of the foreign commerce of the United States, the vessels in such fleet to be so designed as to be readily and quickly convertible into transport and supply vessels in a time of national emergency. In planning the development of such a fleet the Secretary of Commerce is directed to cooperate closely with the Navy Department as to national-defense needs and the possible speedy adaptation of the merchant fleet to national-defense requirements.

Second, the ownership and the operation of such a merchant fleet by citizens of the United States insofar as may be practicable.

Third, the planning of vessels designed to afford the best and most complete protection for passengers and crew against fire and all marine perils.

Fourth, the creation and maintenance of efficient shipbuilding and repair capacity in the United States with adequate numbers of skilled personnel to provide an adequate mobilization base.

Section 211 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1121 (1976), states:

The Secretary of Commerce is authorized and directed to investigate, determine, and keep current records of--

(a) The ocean services, routes, and lines from ports in the United States, or in a Territory, district, or possession thereof, to foreign markets, which are, or may be, determined by the Secretary of Commerce to be essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States, and in reaching his determination the Secretary of Commerce shall consider and give due weight to the cost of maintaining each of such steamship lines, the probability that any such line cannot be maintained except at a heavy loss disproportionate to the benefit accruing to foreign trade, the number of sailings and types of vessels that should be employed in such lines, and any other facts and conditions that a prudent business man would consider when dealing with his own business, with the added consideration, however, of the intangible benefit the maintenance of any such line may afford to the for-

eign commerce of the United States, to the national defense, and to other national requirements;

(b) The bulk cargo carrying services that should, for the promotion, development, expansion, and maintenance of the foreign commerce of the United States and for the national defense or other national requirements be provided by United States-flag vessels whether or not operating on particular services, routes, or lines;

(c) The type, size, speed, method of propulsion, and other requirements of the vessels, including express-liner or super-liner vessels, which should be employed in such services or on such routes or lines, and the frequency and regularity of the sailings of such vessels, with a view to furnishing adequate, regular, certain, and permanent service, or which should be employed to provide the bulk cargo carrying services necessary to the promotion, maintenance, and expansion of the foreign commerce of the United States and its national defense or other national requirements whether or not such vessels operate on a particular service, route, or line;

(d) The relative cost of construction of comparable vessels in the United States and in foreign countries;

(e) The relative cost of marine insurance, mainteance, repairs, wages and subsistence of officers and crews, and all other items of expense, in the operation of comparable vessels under the laws, rules, and regulations of the United States and under those of the foreign countries whose vessels are substantial competitors of any such American vessel;

(f) The extent and character of the governmental aid and subsidies granted by foreign governments to their merchant marine;

(g) The number, location, and efficiency of the shipyards existing on June 29, 1936, or thereafter built in the United States;

(h) To investigate and determine what provisions of this chapter and other Acts relating to shipping should be made applicable to aircraft engaged in foreign commerce in order to further the policy expressed in this chapter, and to recommend appropriate legislation to this end;

(i) The advisability of enactment of suitable legislation authorizing the Secretary of Commerce in an economic or commercial emergency, to aid the farmers and cotton, coal, lumber, and cement producers in any section of the United States in the transportation and landing of their products in any foreign port, which products can be carried in dry-cargo vessels by reducing rates, by supplying additional tonnage to any American operator, or by operation of vessels directly by the Secretary of Commerce, until such time as the Secretary of Commerce shall deem such special rate reduction and operation unnecesasry for the benefit of the American farmers and such producers; and

(j) New designs, new methods of construction, and new types of equipment for vessels; the possibilities of promoting the carrying of American foreign trade in American vessels; and intercoastal and inland water transportation, including their relation to transportation by land and air.

Section 212 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1122 (1976), states:

The Secretary of Commerce is authorized and directed—

(a) To study all maritime problems arising in the carrying out of the policy set forth in subchapter I of this chapter;

(b) To study, and to cooperate with vessel owners in devising means by which—

(1) the importers and exporters of the United States can be induced to give preference to vessels under United States registry; and

(2) there may be constructed by or with the aid of the United States express-liner or superliner vessels comparable with those of other nations, especially with a view to their use in national emergency, and the use in connection with or in lieu of such vessels of transoceanic aircraft service;

(c) To collaborate with vessel owners and shipbuilders in developing plans for the economical construction of vessels and their propelling machinery, of most modern economical types, giving thorough consideration to all well-recognized means of propulsion and taking into account the benefits accuring from standardized production where practicable and desirable; and

(d) To establish and maintain liaison with such other boards, commissions, independent establishments, and departments of the United States Government, and with such representative trade organizations throughout the United States as may be concerned, directly or indirectly, with any movement of commodities in the water-borne export and import foreign commerce of the United States, for the purpose of securing preference to vessels of United States registry in the shipment of such commodities.

The Federal Maritime Commission is authorized and directed—

(e) To investigate, under the regulatory powers transferred to it by this chapter, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

The Secretary of Commerce is authorized and directed—

(f) To study means and methods of encouraging the development and implementation of new concepts for the carriage of cargo in the domestic and foreign commerce of the United States, and to study the economics and technological aspects of the use of cargo containers as a method of carrying out the declaration of policy set forth in subchapter I of this chapter, and in carrying out the provisions of this subsection and such policy the United States shall not give preference as between carriers upon the basis of length, height, or width of cargo containers or length, height, or width of cargo container cells and this requirement shall be applicable to all existing container vessels and any container vessel to be constructed or rebuilt; and

(g) To make recommendations to Congress, from time to time, for such further legislation as he deems necessary better to effectuate the purpose and policy of this chapter.

Section 501 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1151 (1976), states:

(a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of higher transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel shall be

suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this subchapter and under such further conditions and limitations as may be prescribed in the rules and regulations of the Secretary of Commerce has adopted as provided in section 114(b) of this title; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this chapter.

Section 502 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1152 (1976), states:

(a) If the Secretary of the Navy certifies his approval under section 1151(b) of this title, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter into a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 1155 of this title with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors

related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this chapter, of building such vessel in a foreign shipyard.

(b) The amount of reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice

of his intention to compute or recompute such estimated foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 1155 of this title) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less. In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in

the same proportion as provided for the payments on account of the construction cost in the contract between the shipbuilder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on oustanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser, within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(d) Repealed. Pub. L. 87-877, § 2(a), Oct. 24, 1962, 76 Stat. 1200

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or unreasonable, and if a citizen of the United States agrees to purchase said

vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction differential subsidy determined as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall at least once each year, as required for purposes of this chapter, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under this subchapter and subchapter VII of this chapter, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or

shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this chapter, negotiate with the bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this chapter, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Commerce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for

the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under this subchapter, except section 1159 of this title) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this chapter. If the vessel is constructed under section 1159 of this title the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater the the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bid-

der, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 1125 of this title, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter. Such vessel shall thereupon be eligible for an operating-differential subsidy under subchapter VI of this chapter, notwithstanding the provisions of section 1171(a)(1), and section 1180(1) of this title, or any other provision of law.

Section 504 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1154 (1976), states:

> If a qualified purchaser under the terms of this subchapter desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 1152 of this title, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel.

> The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 1152(a) of this title or under a contract negotiated by the Secretary of Commerce as provided in section 1152(b) of this title in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 1153 of this title. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

Section 506 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1156 (1976), states:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States,

and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

Section 1104(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1274(a) (1976), states:

> Pursuant to the authority granted under section 1103(a), the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> (1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally

> for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland lakes of the United States; (C) in foreign trade as defined in section 905 of this Act for purposes of title V of this Act; (D) in the fishing trade or industry; or (E) with respect to floating drydocks in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a) (1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;
>
> (2) financing the purchase of vessels heretofore acquired by the Fund under the provisions of section 1105 and reconditioning and reconstructing such vessels;
>
> (3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended; or
>
> (4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this title, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

Section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. § 883 (Supp. 1979) states in relevant part:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof as determined by the Secretary of the Treasury to be recovered from any consignor, seller, owner, importer, consignee, agent, or other person or persons so transporting or causing said merchandise to be transported), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title: . . .

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SHELL OIL COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SHELL OIL CO.

QUESTION PRESENTED

Did the Court of Appeals correctly hold that the Secretary of Commerce lacks authority to waive permanently restrictions required by the Merchant Marine Act, 1936, as amended, against use in domestic trade of a vessel built with construction-differential subsidy when the Act not only requires such vessels to engage exclusively in foreign trade but expressly limits the Secretary's authority to waive domestic trade restrictions to periods of no more than six months in any year?

STATEMENT OF THE CASE

Respondent Shell Oil Company ("Shell") brought this case to obtain a declaration that certain actions taken by the Federal parties are contrary to the Merchant Marine Act, 1936, as amended ("the Act") and to obtain an injunction prohibiting implementation of those actions. The case was filed in the United States District Court for the District of Columbia on September 22, 1977. On November 22, 1977, Judge Charles R. Richey issued a Memorandum Opinion and Order adjudicating cross-motions for summary judgment. *Shell Oil Co.* v. *Kreps*, 445 F.Supp. 1128 (D.D.C. 1977) (Pet. App. 65a-95a).[1] The motions on both sides were granted in part and denied in part. Shell appealed that portion of the Order which granted summary judgment to petitioners and the Federal parties and denied Shell the requested declaration and injunction. On February 6, 1979, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and ordered that the requested declaration and injunction be entered. *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814 (D.C. Cir. 1979)(Pet. App. 1a-51a).

The controversy arises from a letter dated August 31, 1977, in which Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs ("Assistant Secretary") and Howard F. Casey and Samuel B. Nemirow, members of the Maritime Subsidy Board ("MSB") ruled that the T.T. STUYVESANT ("STUYVESANT"), a 225,000 deadweight ton

[1] Materials in the Appendix to the Petition for a Writ of Certiorari are cited "Pet. App. ____." Materials in the Appendix to Petitioners' Brief are cited "App. ____."

("dwt") oil tanker could be operated in the domestic trade without limitation, provided that construction-differential subsidy ("CDS") be repaid over 20 years. (Pet. App. 11a; App. 34-38) A second letter of the same date ruled that government loan guarantees totalling $60,200,000 would be approved. (Pet. App. 11a; App. 39-11).[2] The Assistant Secretary and MSB members took these actions as delegatees of Juanita M. Kreps, Secretary of Commerce ("Secretary").

Prior to these actions, the STUYVESANT was barred from domestic trade because it was built with the aid of CDS. By statute, CDS may be paid only for the construction of vessels to be used in the United States foreign trade, and owners of vessels built with CDS are required to restrict trade activity accordingly. Merchant Marine Act, 1936 §§ 501, 506, 46 U.S.C. §§ 1151, 1156. The funds represent the approximate cost differential between building a ship in the United States and abroad, thus compensating for the competitive advantage enjoyed by foreign vessels. Merchant Marine Act, 1936, § 502, 46 U.S.C. § 1152. Since United States domestic trade is restricted to vessels built in the United States, no CDS is necessary for vessels engaging in this trade. Jones Act § 27, 46 U.S.C. § 883.

The CDS funds were paid pursuant to an agreement of June 20, 1972, between MSB and Seatrain Shipbuilding Corporation ("Seatrain"), the builder of the STUYVESANT. On the same date, Polk

[2] Guarantees in the amount of $28,845,000 had already been extended during the construction period. New guarantees in the amount of $31,355,000 were to be extended upon the sale of the STUYVESANT. The CDS amounted to $27,200,000. (Pet. App. 8a; App. 439).

Tanker Corporation ("Polk"), as the vessel purchaser, agreed to operate the STUYVESANT exclusively in the United States foreign trade. (Pet. App. 9a).

On July 8, 1977, as the vessel neared completion, Polk filed with MSB a request that the domestic trade restrictions of sections 501 and 506 be waived with respect to the STUYVESANT for a period of three years, provided a pro rata portion of CDS was repaid. The request stated that if a waiver were granted, the STUYVESANT would be chartered to the SOHIO Petroleum Corporation ("SOHIO") for use in the Alaskan oil trade. The sole statutory authority for the waiver cited in the request was section 207 of the Act, 46 U.S.C. § 1117. (Pet. App. 10a-11a; App. 18-33). The MSB, by published notice, opened Docket S-565 for the Polk request and invited public comment. 42 Fed. Reg. 37229 (1977).

At the time these actions occurred, Shell was the purchaser under a construction contract entered into on February 28, 1975 of two 188,500 dwt San Diego Class Tankers being constructed by National Steel and Shipbuilding Company, San Diego, California ("NASSCO"). Both vessels were to be built without government subsidies or financing aids. The approximate cost of each vessel was to be $92,000,000. The first vessel was scheduled for delivery in early 1978 and the second vessel in September, 1978. (App. 7)[3]

The two NASSCO vessels were designed to meet the highest world and United States safety and environmental standards for tank vessels. Each vessel has segregated ballast meeting Inter-

[3] The first vessel was delivered on March 14, 1978. The second vessel was delivered on October 25, 1978.

Governmental Marine Consultative Organization standards, double bottoms, and advanced cargo handling, safety, and navigation features. (App. 8).

At delivery, each NASSCO vessel was sold to a United States citizen, and Shell, with the approval of the Maritime Administration, entered a time charter for an initial period of 23 years. (App. 8). Under the time charters, Shell has agreed to pay a rate which covers both operating costs and, over 23 years, the original cost of each vessel plus interest. Shell is obligated to make these payments whether or not the vessels are employed. The industry refers to such agreements as "hell or highwater" charters. (App. 8).[4]

Shell caused the vessels to be built for the purpose of engaging in the Alaskan oil trade. Prior to executing the construction contracts, Shell projected that either the ships would be needed by Shell to transport Alaskan crude to its own refineries or that, due to a shortfall in available unsubsidized vessel tonnage, other oil companies owning Alaskan crude would need the vessels. (App. 181-182).[5] There is no trade other than the Alaskan oil trade in which the vessels can economically be used. In other domestic trades, there is no other demand for oil tankers of the

[4] Shell, as a non-U.S. Citizen corporation under the Shipping Act of 1916, as amended, 46 U.S.C. § 801, *et seq.*, cannot own vessels which are to be operated in the United States coastwise trade.

[5] At the time, Shell did not know whether or not it would be successful in obtaining rights to Alaskan crude. As it happened, Shell did not obtain such rights. Hence, the crude belonging to other oil companies became the sole prospect for employment of the Shell vessels.

size of the NASSCO vessels. The vessels cannot be used economically in the foreign trade because they were not built with subsidy. (App. 182).

Shell made vigorous attempts, dating back to the fall of 1976, to charter the NASSCO vessels. As of August 31, 1977, Shell had not concluded any charter agreements.[6]

On August 8, 1977, Shell, among others, filed comments in Docket S-565 indicating that the Polk request was beyond the lawful authority of the MSB and that Shell's interests could be seriously harmed if the request were granted. (Pet. App. 10a-11a; Protest of Shell Oil Company, Appendix A to Memorandum of Points and Authorities in Support of Shell Oil Company's Motion for Summary Judgment).

On August 25, 1977, in correspondence not served on Shell or any other party to Docket S-565, Polk requested a permanent waiver for the STUYVESANT, coupled with a repayment of CDS over twenty years. As before, if the waiver were granted, the vessel would be chartered to SOHIO for three years. Polk withdrew the prior request for a three year waiver on August 26, 1977. MSB, in the letters of August 31, informed Polk that the August 25 request would be granted. The letters were, like the request, not served on Shell or published in the Federal Register. (Pet. App. 10a-11a).

[6] On March 14, 1978, Shell time-chartered the first vessel to SOHIO for a period of two years. The charter can be extended for a third year at the option of SOHIO. On October 25, 1978, Shell time-chartered the second vessel to SOHIO for a period of two years. SOHIO also has an option to renew this charter for a third year.

The August 31 letters permit repayment of CDS through the execution of a twenty year promissory note providing for semi-annual level installments of principal and interest commencing on the date of vessel delivery. Interest is to be paid at the same rate paid on the government guaranteed bonds sold at delivery of the vessel. Interest is not to be paid on the CDS funds for the approximately five-year period they were held and used by Seatrain. The note is secured by a third mortgage on the vessel. The two letters cite no authority for the waiver of trade restrictions or the acceptance of a promissory note as repayment of CDS. (Pet. App. 11a).

Following issuance of the August 31 letters, a closing transaction at which the STUYVESANT was to be sold and the new Title XI guaranteed bonds were to be issued was scheduled for September 23, 1977. On September 12, 1977, Shell filed a request for review by the Secretary of Commerce. On September 22, 1977, no response having been heard from the Secretary, Shell filed a civil action in the United States District Court for the District of Columbia seeking review of the August 31 actions. The same day, Judge Oliver Gasch of the United States District Court temporarily restrained the Board and Assistant Secretary from participating in the closing. *Shell Oil Co.* v. *Kreps*, No. 77-1645 (Temporary Restraining Order) (D.D.C. Sept. 22, 1977). The restraining order was dissolved by Judge Charles R. Richey on September 30, 1977. Judge Richey stated that Shell would not suffer irreparable harm until the first NASSCO vessel was delivered. *Shell Oil Co.* v. *Kreps*, No. 77-1645 (Findings of Fact and Conclusions of Law) (D.D.C. Sept. 30, 1977) (App. 168).

The STUYVESANT was delivered on September 30, 1977. At the closing, Polk unconditionally transferred title to the vessel to United States Trust Company ("USTC") as owner-trustee for the equity-owner, General Electric Credit Corporation ("GECC"). Polk also assigned to USTC, as trustee for GECC, its obligations on the $28,845,000 in government guaranteed bonds sold to finance the STUYVESANT's construction and a $27,200,000 promissory note payable to the Secretary of Commerce. The assignments to USTC of both the obligations on the bonds and the promissory note were without recourse. USTC, as trustee, issued and sold an additional $31,355,000 in government guaranteed bonds and paid Polk $32,600,000, which was placed in escrow for the benefit of GECC. The note, bonds, and escrow fund totaled $120,000,000.[7] USTC bareboat chartered the vessel to Queensway Tankers, Inc. The bareboat charter was on a "hell or highwater" basis. Queensway time-chartered the STUYVESANT to SOHIO for three years. (Pet. App. 70a-71a).

In the order and memorandum opinion of November 22, 1977, adjudicating cross-motions for summary judgment, the District Court held that the Secretary had authority to waive trading restrictions and to accept promissory notes, but could only take such action after making a determination that it would not result in unfair competition to the unsubsidized fleet. Because the Secretary did not consider

[7] As a consequence of this transaction, the petitioners no longer have an economic stake in the proceedings before this Court. Regardless of the outcome, Polk and Seatrain have been relieved of all obligations. Their parent corporation, Seatrain Lines, Inc., does have an interest in that it guaranteed the assigned obligations. *Brief for the Petitioners*, at 11 n.2.

the competitive effects of the August 31 actions, the court held the actions to be arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The court thus ordered the agency to conduct a new proceeding in which it evaluated the competitive impact of the waiver.[8]

In the decision of February 6, 1979, the United States Court of Appeals for the District of Columbia Circuit held that the Secretary had no authority to waive permanently trading restrictions on vessels built with CDS. (Pet. App. 1a-51a). On March 22, 1979, the full court denied appellees' suggestions for rehearing *en banc*, with only the originally dissenting judge noting a dissent. (Pet. App. 63a-64a).

In this Court, the Federal parties raise an argument, first initiated in their suggestions for rehearing *en banc*, that the Court of Appeals lacked jurisdiction.

[8] On January 6, 1978, the MSB, after receiving written submissions on the question of competitive effect and denying Shell's request for a trial-type hearing, concluded that the August 31, 1977 actions were valid. *T. T. Stuyvesant-Repayment of CDS, Operations in Jones Act Trade*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. of Comm. 1978) (App. 566). Shell timely requested Secretarial review of the MSB Order, but such review was declined. On October 14, 1978, Shell filed in United States District Court a complaint challenging the validity of the MSB Order. Following the Court of Appeals' decision in the proceeding now before this Court, the October 14 action was dismissed without prejudice.

SUMMARY OF THE ARGUMENT

The actions of the Federal parties in allowing the STUYVESANT to engage in domestic trade, despite its construction with CDS, are contrary to the letter and spirit of the Act. Analysis of the plain language of the Act, particularly sections 501, 506, and 509, makes clear that the actions are prohibited. Section 501 permits subsidy to be paid only for ships to be used in foreign trade. Section 506 requires all owners of vessels built with CDS to agree to restrict vessel activity to the foreign trade, with limited exceptions for incidental domestic use. Nonincidental domestic use of vessels built with CDS is expressly limited to six months in any year. Section 509 makes clear that government aid to vessels built for the domestic trade shall not include CDS.

Additional intrinsic indicia of legislative intent support a literal reading of the statutory language. First, the implied authority to waive permanently trading restrictions is an exception to the general statutory rule that vessels built with CDS shall be used exclusively in foreign trade. Such implied exclusions are not favored. Second, Congress expressly provided five exceptions to the general rule restricting vessels to foreign trade. Where one or more exceptions are created by expression, additional exceptions cannot be created by implication. Third, the statutory construction urged by petitioners and the Federal parties renders the six month limitation of section 506 meaningless. A statute should be construed to give all provisions meaning. Fourth, Congress provided in Title VI of the Act, concerning operating-differential subsidy, a waiver mechanism closely analogous to that read into Title V of the Act

by petitioners and the Federal parties. Congress should be presumed to have intentionally excluded from one section of a statute that which it intentionally included in another.

Petitioners and the Federal parties have failed to identify any statutory provision authorizing the permanent waiver of trading restrictions on vessels built with CDS. Section 504 of the Act, 46 U.S.C. § 1154, expressly recognizes the limitation on the Secretary's contract authority contained in Section 506. Reorganization Plan No. 21 merely recounts in summary form the powers expressly granted in the numerous provisions it covers. Section 207 of the Act, 46 U.S.C. § 1117, is a carefully limited provision designed to implement authority found elsewhere in the Act.

In addition to the indicia of congressional intent intrinsic to the Act, the legislative history demonstrates conclusively that section 506 was intended to cover all instances of permissible waivers and that waivers for nonincidental domestic use of vessels built with CDS must be limited to six months in any year. The CDS program was enacted to replace the mail subsidy program which had unfairly undermined domestic competition. A version of section 506 which would have permitted precisely what defendants wish to do in this case was passed by the House in 1935, but ultimately rejected by Congress in 1936 as posing too great a threat to the domestic trade. In 1938, section 506 was revised to read virtually as it does today. The amendment was for the purpose of clarifying Congress' intent to prohibit permanent waivers. It removed from the Act the only language which even arguably authorized such waivers.

The extrinsic evidence of congressional intent relied on by petitioners and the Federal parties to support their construction of section 506 is unpersuasive and legally inadequate. The sole evidence supporting petitioners' and the Federal parties' construction of section 506 as enacted in 1936 is an isolated statement made by Senator Guffey. The statement was never endorsed by Congress or any congressional committee and is not consistent with the interpretations expressed by Congress and by Maritime Commission Chairman Kennedy in 1938, when Section 506 was amended. Petitioners' and the Federal parties' evidence consists also of a relatively recent administrative interpretation which, according to all traditional criteria, is wholly undeserving of judicial deference. Petitioners and the Federal parties rely finally on an alleged congressional acquiescence in the agency interpretation through a 1972 amendment of Title XI of the Act. Not only is this evidence ambiguous at best, but the amendment of a section of a statute by a later Congress deserves little weight in determining the original congressional intent behind a wholly separate section not part of the amendment.

The permanent waiver of trading restrictions on vessels built with CDS will disrupt the domestic trade, contrary to the fundamental purpose of section 506. Persons planning to construct unsubsidized vessels must be able to assess future vessel supply in the legislatively protected domestic market. Waiving entry restrictions for vessels built with CDS makes such assessments impossible.

The Court of Appeals had jurisdiction. The judgment was properly appealed pursuant to Rule 54(b)

of the Federal Rules of Civil Procedure. It was also properly appealed as a denial of injunctive relief under 28 U.S.C. § 1292(a) and even meets the tests for appealability under 28 U.S.C. § 1291 in the absence of a Rule 54(b) certification.

ARGUMENT

A. THE MERCHANT MARINE ACT, 1936, PROHIBITS PERMANENT WAIVERS OF TRADING RESTRICTIONS ON VESSELS BUILT WITH CDS

1. Introduction.

The fundamental issue in this appeal involves the authority of the Secretary of Commerce. Specifically, it involves the question whether or not the Secretary has authority to waive permanently restrictions against the use of a vessel built with CDS in domestic trade.

It should be emphasized that the question is the authority to grant a permanent waiver. It is not the authority to receive repayment of CDS. As the succeeding discussion will make clear, section 506 of the Merchant Marine Act, 1936, as amended, authorizes the Secretary to grant waivers for a period of six months in any one year. When such a waiver is granted, section 506 also requires a partial repayment of CDS measured by the relationship between the period of the waiver and the economic life of the vessel.

The touchstone of the section—and of the question—is the limitation on the period of the waiver. It cannot exceed six months. The partial repayment of

CDS is a consequential adjunct. It becomes operational only after the Secretary has determined—upon application—that the temporary waiver may appropriately be granted in the first place.

The position of petitioners and the Federal parties, in this regard, is an illustration of the colloquial tail wagging the dog. The section contains not one word authorizing a permanent waiver. Petitioners and the Federal parties, in the final analysis, can only get to the conclusion of permanent waiver by extrapolating it as consequence of full repayment. Just as partial repayment yields temporary waiver, full repayment—on this view—yields permanent waiver.

But the point is that the repayment is a consequence of the waiver, not the waiver a consequence of the repayment. Waiver is limited to one six month period in any year. It cannot spur a greater measure of repayment. Repayment does not even become an issue until after the merits of the application for waiver have been determined.

The matter of waiver is a matter of use of the vessel in domestic trade. It implements a careful tuning of fundamental policy interests regarding the adoption of a subsidy program in the first instance. Partial repayment of subsidy is required as the minimum demand of equity. It is neither a vehicle for the Government to recover subsidy once awarded, nor a means for the purchaser to acquire expanded trade opportunity.

Permanent waiver is not allowed for reasons that have nothing to do with the extent of repayment of CDS. As the discussion of legislative history under

subhead 4 of this argument will show, a clear wall between domestic trade and foreign trade has been erected. On the one hand, the Jones Act preserves the domestic trade to vessels built in the United States, and, thus, saves such vessels from foreign competition enjoying cost advantages. On the other hand, the Merchant Marine Act, 1936, establishes a subsidy program for United States vessels in foreign trade which compensates for the cost advantages of the foreign vessels with which they must compete. In fairness to the United States vessels in domestic trade, which do not share in this subsidy, the Act also restricts the United States vessels built with subsidy to foreign trade.

The transfer of vessels from foreign to domestic trade, even with full subsidy repayment, can only disrupt the free market mechanism so carefully preserved for the domestic trade by the Jones Act. Firms deciding to construct ships without CDS must be able to assess future demand and supply in that market. If ships supposedly limited to foreign trade can enter the domestic market whenever economic conditions make it desirable for them, future tonnage supply will be impossible to assess. Under these conditions, no capital will be invested in unsubsidized vessels.

Once built with CDS, a vessel takes its defined place in the supply and demand schedule of foreign trade potential, but it is simultaneously removed from the domestic trade inventory. The entire economics of the unsubsidized fleet is built on this principle.

Repayment of CDS, full or partial, simply does not reach these considerations. The issue of the

Secretary's authority to alter the fleet balance by a permanent waiver far transcends any question about the extent of repayment of CDS.

2. The Plain Language of the Act Prohibits Permanent Waivers.

Since the inception of these proceedings, the parties have identified but one provision in the Merchant Marine Act, 1936, addressing the waiver of trading restrictions on vessels built with CDS — section 506. That section limits waivers to six months in any year. Petitioners' and the Federal parties' attempts to finesse this rather fundamental defect in their position are creative, but ultimately unavailing.

Title V of the Act, as amended, 46 U.S.C. §§ 1151-1161, creates authority for the payment of CDS. Sections 501 and 506 of the Act make clear, on their face, that CDS may be paid only for construction of ships used exclusively in the United States foreign trade and that ships built with CDS may not engage in domestic trade on a permanent basis. Section 501 provides, in relevant part,

> (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel *to be used in the foreign commerce of the United States.* No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements *of the foreign commerce of the United States,* [and] will aid in the promotion and development of such commerce . . . .
>
> (c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is *to be used in the foreign commerce of the United States.* If the Secretary of Commerce, in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter, *the Secretary of Commerce may approve such application* and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, *subject to all the applicable conditions and limitations of this subchapter* . . . .

46 U.S.C. § 1151 (emphasis added).

Section 506 provides, in full,

> *Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade,* or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a

round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that portion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. *The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter.* Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

46 U.S.C. § 1156 (emphasis added).

Section 506 requires all owners of vessels built with CDS to agree to restrict vessel activity to the foreign trade and provides limited exceptions. The exceptions concern four types of voyages in which domestic trade is present, but is merely incidental to foreign trade. The fifth category, which could encompass solely domestic voyages, is expressly limited to six months out of any year.

As aptly observed by the Court of Appeals,

> Section 506, therefore, is *the clause* in the Merchant Marine Act which separates the two fleets, *i.e.*, the Jones Act domestic trade fleet (unsubsidized), and the U.S. foreign trade fleet (subsidized). The statutory language is strong: "Every owner. . .shall agree." It is not just the original builder or first purchaser, but every owner during the life of the vessel who must agree to the restriction. The restriction is "that the vessel shall be operated exclusively in foreign trade," for the obvious purpose aforementioned. The restrictive language also refers to a subsidy which "has been paid." The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade. Payment of the subsidy stamps indelibly the character of the ship then and thereafter.

Alaska Bulk Carriers, Inc. v. *Kreps*, Pet. App. 14a (emphasis in original; footnotes omitted).

The only section in Title V providing for assistance to vessels in the domestic trade is section 509, 46 U.S.C. § 1159. That section permits the Govern-

ment to pay for mandatory national defense features and to finance up to 87.5 percent of the vessel purchase price. The section expressly states, however, "no construction-differential subsidy shall be allowed." 46 U.S.C. § 1159.

On its face, then, the Act prohibits the actions taken by the Federal parties. Vessels built with CDS are restricted to foreign trade and the waiver of this trading restriction for nonincidental domestic use is limited to six months in any one year. This alone should determine the outcome here. As this Court has often recognized, there is no better evidence of the purpose of a statute than the plain meaning of the words Congress has chosen to express its wishes. *United States* v. *Bornstein*, 423 U.S. 303, 309-11 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940).

Two very recent decisions by the Court are dramatic illustrations of this basic concept. In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), the Court foiled the attempt of a federal agency to circumvent the plain language of the Endangered Species Act of 1973. The Act, as relevant, provided,

> All . . . agencies shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the*

> *destruction or modification of habitat of such species* which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

16 U.S.C. § 1536 (1976) (emphasis added).

The Tennessee Valley Authority ("TVA") contended that common sense required that the statutory term "actions" be construed to exclude the completion of projects started before the Act was passed by Congress. If projects predating the Act were not excluded, the TVA would be forced to abandon a virtually completed multimillion dollar dam. Operation of the dam would destroy a listed threatened species, the snail darter. The Court held that the plain language of the Act had to be followed, regardless of the equities marshalled by the TVA. The Chief Justice observed,

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

437 U.S. at 172-73.

To the same effect is *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978). In *Sloan*, the Court had to construe section 12(k) of the Securities Exchange Act of 1934. The section, on its face, permits the Securities and Exchange Commission ("SEC") summarily to suspend trading in a security "for a period not exceeding ten days." 15 U.S.C. § 781(k). The SEC contended that the section permitted a series of consecutive ten day suspensions.

The Court rejected the Commission's assertion that its interpretation of section 12 was the only one that furthered the Act's remedial purposes. The Court observed,

> [T]he only question confronting us is whether, even upon a periodic redetermination of "necessity", the Commission is statutorily authorized to issue a series of summary suspension orders based upon a single set of events or circumstances which threaten an orderly market. This question must, in our opinion, be answered in the negative.
>
> The first and most salient point leading us to this conclusion is the language of the statute. . . . The Commission would have us read ["for a period not exceeding ten days"] as a limitation only upon the duration of a single suspension order. So read, the Commission could indefinitely suspend trading in a security without any hearing or other procedural safeguards as long as it redetermined every 10 days that suspension was required by the public interest and for the protection of investors. While perhaps not an impossible reading of the statute, we are

> persuaded it is not the most natural or logical one. The duration limitation rather appears on its face to be just that — a maximum time period for which trading can be suspended for any single set of circumstances.

436 U.S. at 111-12.

The Court's analysis in *Sloan* is easily applicable here. Petitioners' and the Federal parties' reading of section 506 may not — perhaps — be an impossible one, but it is not — certainly — the most natural or logical. The six month duration limitation in section 506 is just that, a maximum time period for which trade restrictions may be waived in any one year.[9]

Four additional intrinsic indicia of congressional intent reinforce the conclusion that Congress intended what its language does: to prohibit permanent waivers of trading restrictions on vessels built with CDS. First, implied exceptions to express statutory provisions are not favored. *See, e.g., United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F.2d

[9] Petitioners and the Federal parties suggest that the plain language of Title V should not be rigorously applied because the broad purposes of the Act require broad secretarial authority. Clearly, however, the mere fact that the purposes of an act are broad cannot justify deviation from specific congressional commands. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 405-06 (1976); *Commissioner* v. *Gordon*, 391 U.S. 83, 92-93 (1968); *Bissette* v. *Colonial Mortgage Corp.*, 155 U.S. App. D.C. 360, 477 F.2d 1245, 1246-47 (1973). The plain language of a statute has been effectively modified by judicial interpretation to avoid frustration of congressional purpose only in rare instances, where the conflict between the language and the purpose has been direct and compelling. *See, e.g., FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 348-49 (1968); *United States* v. *Maryland*, 121 U.S. App. D.C. 258, 349 F.2d 693, 695 (1965); *c.f. Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966). No such conflict exists here.

637, 644-45 (6th Cir. 1952), *cert. denied*, 344 U.S. 897 (1952); *MacQuarrie* v. *McLaughlin*, 294 F.Supp. 176, 178 (D. Mass. 1968), *aff'd*, 394 U.S. 456 (1969); *Knapczyk v. Ribicoff*, 201 F.Supp. 283, 285 (N. D. Ill. 1962). In this case, the Federal parties are not merely seeking an implied power to amend CDS contracts, but an implied exception to the statutory prohibition against use of vessels built with CDS in domestic trade.

Second, where a statutory mandate is followed by specifically enumerated exceptions, the enumerated exceptions are presumed to be exclusive. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978); *National Railroad Passenger Corp.* v. *Nat'l. Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942); *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010, 1013-14 (5th Cir. 1968); *Gotkin* v. *Miller*, 379 F.Supp. 859, 865 (E.D.N.Y. 1974), *aff'd*, 514 F.2d 125 (2d Cir. 1975); *Herzberg* v. *Finch*, 321 F.Supp. 1367, 1369 (S.D.N.Y. 1971); *see* Pet. App. 15a-16a & n.31. Here, the Federal parties seek an implied exception in the face of the five specified exemptions discussed above.

Third, the statutory construction advanced by petitioners and the Federal parties would nullify the six month limitation in section 506. Before the District Court, these parties contended that Section 506 applies to "temporary" waivers, but not "permanent" ones. Since permanent waivers are not barred by section 506, the argument went, the Secretary is free to exercise her general contracting authority to remove the trading restrictions. If, however, the Secretary may amend CDS contracts to

waive restrictions "permanently," she can also reamend them to permit vessels back into the CDS program at a later date. This is especially true where, as here, CDS is "repaid" only by a long term promissory note. The six month limitation can thus be evaded with ease.

In the Court of Appeals, the Federal parties, recognizing that the contract theories advanced in support of their actions would nullify section 506, made the remarkable concession that the Secretary lacks the *authority* to permit a vessel to reattain subsidy status once subsidy has been repaid. Indeed, they stated that *section 506* prohibits them from reconverting the repayment of the note to a resumption of subsidy. *Alaska Bulk Carriers, Inc. v. Kreps, Brief for the Secretary*, at 37 n.26. This admission shows clearly that waiver of trading restrictions on vessels built with CDS is not a simple matter of contract amendment. More importantly, this shows that section 506 has a direct bearing on the "permanent" waiver of trading restrictions. The Federal parties' disavowal of authority to reverse "permanent" waivers may be a practical response to the statutory construction problem created by their actions, but it proves conclusively the philosophical bankruptcy of their position and the position of the petitioners.

In this Court, petitioners and the Federal parties contend that the crucial distinction is not between "temporary" and "permanent" waivers, but between vessels built with CDS which are still subject to the statutorily mandated provisions of the CDS contract and vessels which, by virtue of subsidy repayment and consequent contract amendment, are not. *See*

Brief for the Petitioners, at 26; *Brief for the Federal Parties*, at 52. This construction of the Act is simply at odds with the language of Title V. It ignores the clear commands of section 501 that CDS be paid only for vessels "to be used in the foreign commerce," and of section 509 that, when a vessel is to be used alternatively in the foreign or domestic trade, "no construction-differential subsidy shall be allowed." 46 U.S.C. §§ 1151, 1159.[10] Indeed, it contradicts the very language of section 506 itself. Section 506 applies to "[e]very owner of a vessel for which construction-differential subsidy has been paid . . . ." The statute does not say, as petitioners and the Federal parties would have it, "a vessel for which construction-differential subsidy has been paid and not repaid...."

There is a strong presumption against construing a statute so as to render it ineffective. *Bird v. United States*, 187 U.S. 118, 124 (1902); *United States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968), *cert. dismissed*, 393 U.S. 1008 (1969); *In Re White*, 266 F.Supp. 863, 866 (N.D.N.Y. 1967). There is simply no means by which the Act can be read to permit permanent waivers without rendering section 506 ineffective.

The fourth cannon of construction supporting the Court of Appeals' interpretation of the Act is that Congress should not be presumed to have implied authority in one portion of an act when it expressly conferred the same authority in a parallel portion of the same act. *See, e.g., Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 112-13 (1978);

[10] Section 506 must be read in the context of its surrounding provisions. *See Richards* v. *United States*, 369 U.S. 1, 11 (1962).

FTC v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963); *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972); *J. Ray McDermott & Co.* v. *Vessel Morning Star*, 457 F.2d 815, 818-19 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); *Pena-Cabanillas* v. *United States*, 394 F.2d 785, 789-90 (9th Cir. 1968). In Title VI of the Act, Congress prohibited the payment of operating-differential subsidy (which represents the differential between paying a United States crew and a foreign crew) to any person engaged in domestic trade, but permitted the Secretary to waive the prohibition. Section 805(a), 46 U.S.C. § 1223(a). Before such a waiver can be granted, the Secretary must conduct a hearing to determine whether "unfair competition" will result. *Id.* This waiver authority closely parallels that sought by petitioners and the Federal parties under Title V and is virtually identical to the authority described by the District Court. No adequate explanation has been, or could be, offered as to why Congress would have failed to make express in Title V what it did make express in Title VI.

All available intrinsic indicia thus reveal an intent by Congress to prohibit flatly permanent trading restriction waivers for vessels built with CDS. The result reached by the Court of Appeals is in complete accord with these legislative guideposts.

3. There is No Statutory Authority For the Permanent Waiver of Trading Restrictions.

Petitioners and the Federal parties have failed not only to establish that the Act does not prohibit permanent waivers of trading restrictions on vessels built with CDS, but to show that there is any authority to grant such waivers in the first instance. In-

deed, petitioners candidly admit, "No provision of the Act authorizes *in haec verba* the deletion from a CDS contract of terms restricting the domestic trading of a vessel built with CDS assistance in exchange for full CDS repayment." *Brief for the Petitioners*, at 20. Absent specific authority in statutory law, the Secretary is not free to permit vessels built with CDS to enter domestic trade. *Alaska Bulk Carriers, Inc. v. Kreps*, Pet. App. 37a.

Petitioners and the Federal parties request that authority to waive permanently trading restrictions be inferred from the "broad contractual powers" purportedly granted the Secretary in sections 504 and 207 of the Act. *Brief for the Petitioners*, at 20-22; *Brief for the Federal Parties*, at 49-51. Neither section 504 nor section 207 authorizes permanent waivers, however. Section 504, 46 U.S.C. § 1154, merely authorizes the Secretary to enter into CDS contracts. Far from being unlimited, the contract authority is carefully circumscribed by the section. In fact, the only language in the section addressing the subject of reducing restrictions indicates that section 506 is controlling. The final sentence reads "the contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, *except to the extent expressly required by law.*" 46 U.S.C. § 1154 (emphasis added); *see Alaska Bulk Carriers, Inc. v. Kreps*, Pet. App. 39a-40a.[11]

[11] The House and Senate Reports accompanying the 1951 amendment adding the last sentence of section 504 to the Act both identify the Section 506 restrictions on domestic trade as limiting the Secretary's contract authority. S. Rep. No. 295, 82d Cong., 1st Sess. 4 (1951); H. Rep. No. 2221, 82d Cong. 2d Sess. 25 (1952).

Petitioners seek support for an expansive reading of section 504 in Reorganization Plan No. 21 of 1950. Of course, as petitioners concede, the Reorganization Plan is not an independent source of authority. Nor does the Plan provide insight into the meaning of the Act. The Plan merely provides for transfer of the functions of "making, amending, and terminating subsidy contracts . . . under the provisions of Titles V, VI, and VII, and sections 301, 708, 805(a), and 805(f) of the Merchant Marine Act, 1936 . . . ." Reorganization Plan No. 21 of 1950, § 105(1), 64 Stat. 1273. The power to make contracts is provided expressly in several of the enumerated portions of the Act, including sections 504 and 502. The powers to amend and terminate contracts are also provided expressly in several of the enumerated portions, including sections 606, 608, and 801. 46 U.S.C. §§ 1176, 1178, 1211. Thus, the Plan does not, as petitioners suggest, interpret the Act, but simply recounts in summary form the powers expressly granted in the numerous statutory provisions it covers.

Reliance on section 207, 46 U.S.C. § 1117, is completely misplaced. Section 207 is not a blunderbuss capable of being used by the Maritime Subsidy Board whenever specific authority is lacking in the Act. Rather, it is designed to implement authority contained in other parts of the Act.

The language of the section itself includes an express limitation on its use. It permits the Board to contract and make disbursements to protect collateral "in the same manner that a private corporation may contract *within the scope of authority conferred by its charter.*" 46 U.S.C. § 1117 (emphasis added). Just as a private corporation is bound by its charter,

the Board is bound by the Act. Title V of the Act limits the Board's authority to waive trading restrictions on vessels built with CDS.

The narrow purposes of section 207 are amply documented by the provision's legislative history. In 1935, the Senate Commerce Committee commented,

> Title II creates a Maritime Authority [now the Board] consisting of five members chosen with regard to their special fitness for efficient discharge of their duties and to serve for long terms of office . . . . The Authority is given a considerable amount of discretion in the solution of its problems . . . . Such discretion, however, must have limits, and *in framing the bill it has been our endeavor to confer no greater powers than are necessary and proper considering the ends in view.*

S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935) (emphasis added).

In 1938, Maritime Commission Chairman Kennedy appeared before the Senate Commerce Committee to make the suggestion, ultimately accepted by Congress, that the language of section 207 be clarified. Chairman Kennedy gave as examples of the need for the clarification two shipping lines whose financial difficulties would soon place, or already had placed, vessels securing indebtedness in the hands of the Commission. Chairman Kennedy wanted to make certain that the commission could maintain the condition of these vessels. *See Hearings on S. 3078, Before the Senate Commerce Committee*, 75th Cong., 3d Sess., pt. 12, 1157-58 (1938).

In short, section 207 is a "housekeeping statute." As recognized by the Court of Appeals, this section is not an independent grant of power, but a vehicle for implementing powers granted elsewere in the Act. *Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 41a-42a; *see New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (15 U.S.C. § 717o does not confer independent authority to Federal Power Commission).

Judicial interpretation of section 207 has been consistent with the language and history of the provision. In *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 184 F.2d 245 (1950), *appeal dismissed*, 344 U.S. 806 (1952), the court rejected the contention of the Board's predecessor that the section authorized the purchase of a shipping company's stock as collateral. The opinion states,

> It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execute contracts.

184 F.2d at 249.

It is similarly inconceivable that Congress would have taken the effort to draft the waiver provision of section 506 and then left the authority to grant permanent waivers to be conferred by implication by

section 207. In its boldest form, petitioners' and the Federal parties' invocation of broad contracting authority and of section 207 would completely bypass the entire question of subsidy repayment. If the Secretary can remove trading restrictions by way of contract amendment, she presumably can do so for any appropriate consideration. The matter of subsidy repayment only arises because of section 506 and, once raised, should properly be viewed as a consequence of, not justification for, an otherwise authorized waiver.

4. The Legislative History of the Act Demonstrates That Permanent Waivers Are Not To Be Permitted.

Not only is the statutory language clear. The intent of Congress with respect to the use of vessels built with CDS in domestic trade is further established by the principal extrinsic indicium of legislative intent, the Act's legislative history.

a. Background of the Act.[12]

The Congressional concern for the integrity of the domestic maritime trade — as its awareness of the need for economic compensation for U.S. vessels competing in foreign trade — is of long standing. In 1789, in the second law passed under the Constitution, Congress enacted a tax on foreign vessels operating in the United States domestic trade. The tax effectively prohibited foreign competition by making such operations uneconomical. Act of July 4,

[12] *See generally*, G. Gilmore & C. Black, *The Law of Admiralty*, §§ 11-4 to 11-8 (2d ed. 1975).

1789, 1 Stat. 27. A direct prohibition against foreign vessels in the domestic trade was enacted in 1817. Act of March 1, 1817, 3 Stat. 562. A similar prohibition was re-enacted in 1898. Act of February 17, 1898, 30 Stat. 248. This prohibition is presently included in section 27 of the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. § 883 (1976).[13]

As for United States vessels competing in foreign trade, assistance was provided in the form of mail subsidy contracts. Under these contracts, ships engaged in foreign trade received payments for transporting United States mail. This subsidy program, which originated in the mid 1800's, was revitalized with the Ocean Mail Act of 1891, 26 Stat. 830, and was expanded by the Merchant Marine Act, 1928, 41 Stat. 988.

By 1936, the mail subsidy program had proved a failure. Not only was it an inefficient means of developing a foreign trade fleet, but it was used by unscrupulous operators to subsidize domestic trade

[13] Section 27 provides, in relevant part,

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possession thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title. . .

operations. The deleterious impact of the subsidy on domestic trade was chronicled in two well known government studies on the merchant marine. Under the chairmanship of then Senator Hugo Black, the Special Committee to Investigate Air Mail and Ocean Mail Contracts submitted a scathing report to Congress in 1935 ("the Black Report").[14] The report detailed the misuse of subsidy to upset the domestic market as follows:

> It surely cannot be contended that Congress ever intended mail contracts to be let on links of intercoastal routes, wherein the competition to be faced by the operator was only from other American interests. This was well known to Government officials administering the Merchant Marine Act of 1928, but despite that knowledge such contracts were let and are being operated today. Thus there is placed in the hands of the favored contractor a murderous economic weapon *to be used against his American competitors* in a trade wherein vessels of foreign registry *may not engage.* As an example, attention is called to route 37, operated by the Grace interests through the Panama Mail Steamship Co. This route, extending from San Francisco to Habana, Cuba, is a link in the Grace intercoastal service between San Francisco and New York . . . .

[14] S. Rep. No. 898, 74th Cong., 1st Sess. (1935).

> Another instance is found in the operations of the American Lines Steamship Corporation on route 32 from New York to Balboa, Canal Zone. The American Lines Steamship Corporation is a 100-percent-owned subsidiary of the Atlantic Transport Co. of West Virginia, which is in turn 100 percent owned by the International Mercantile Marine Co. The contractors' vessels operate from New York via Habana, Cristobal, Balboa, San Diego, and Los Angeles to San Francisco. The report of the Postmaster General finds that the payments under this contract, as well as being a mere gratuity to the contractor, *are discriminatory as against 23 other intercoastal lines operating under the American flag without mail-pay aid and consequently serve as a detriment to the American merchant marine.*[15]

The other report on mail contract abuses, cited by the Black Report, was prepared by the Postmaster General for submission to President Roosevelt on January 11, 1935.[16] On the impact of mail subsidies on domestic trade, the report stated,

> The liberal treatment accorded to the operators under the ocean-mail contracts has resulted in much waste and extravagance.

[15] *Id.* 14-15 (emphasis in original).

[16] H.R. Doc. No. 118, 74th Cong., 1st Sess. 3-19 (1935).

> [The operators] have also formed corporations to operate intercoastal and coastwise vessels in competition with nonsubsidized American lines, contrary to the spirit of the law, which does not permit the award of mail contracts or subsidies to operators engaged in the coastwise and intercoastal trade. By this means millions of dollars of mail pay has been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade, resulting in unfair competition with nonsubsidized American lines in the same trade. In some cases mail contracts have actually been awarded directly to favored intercoastal and coastwise operators without the necessity of them having to organize subsidiaries to so unfairly compete with other nonsubsidized American lines.[17]

The report concluded,

> All American operators in the protected trade should receive the same treatment. Aid in that particular trade should be given to all or none, and any change in policy or law should carry with it the same kind of protection and benefits to all.[18]

Thus, the mail subsidy was faulted for producing the very result complained of by Shell in this case; it was used to compete unfairly in domestic trade. At

[17] *Id.* 11.
[18] *Id.* 19.

the same time, some form of subsidy was necessary to enable United States vessels to compete in foreign trade. The Black report,[19] and a report by the Interdepartmental Committee on Shipping Policy[20] both recognized that foreign shipyard costs were lower than United States yard costs due to low wage scales and direct government subsidies. Both recommended that the United States should compensate for this cost differential through payment of a construction subsidy on United States built vessels to be used exclusively in foreign trade.

Confronted with a subsidy program which undermined the Jones Act and an economic situation demanding a subsidy for foreign trade vessels, President Roosevelt called for legislative reform. In a message to Congress delivered on March 4, 1935, the President requested abandonment of the mail subsidy and implementation of construction subsidy and operating subsidy programs.[21] The President stated,

> In many instances in our history the Congress has provided for various kinds of disguised subsidies to American shipping. In recent years the Congress has provided this aid in the form of lending money at low rates of interest to American shipping companies for the purpose of building new ships for foreign trade. It has, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts.

[19] Black Report, at 43-44.
[20] H.R. Doc. 118, at 22, 30-31.
[21] H.R. Doc. 118, at 1-3.

This lending of money for shipbuilding has in practice been a failure. Few ships have been built and many difficulties have arisen over the repayment of the loans. Similar difficulties have attended the granting of ocean-mail contracts. The Government today is paying annually about $30,000,000 for the carrying of mails which would cost, under normal ocean rates, only $3,000,000. The difference, $27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid that Government ought to give to shipping.

I propose that we end this subterfuge. If the Congress decides that it will maintain a reasonably adequate American merchant marine I believe that it can well afford honestly to call a subsidy by its right name.

Approached in this way a subsidy amounts to a comparatively simple thing. It must be based upon providing for American shipping Government aid to make up the differential between American and foreign shipping costs. It should cover first the difference in the cost of building ships; second, the difference in the cost of operating ships; and finally, it should take into consideration the liberal subsidies that many foreign governments provide for their shipping. Only by meeting this threefold differential can we expect to maintain a reasonable place in ocean commerce for ships flying the American flag, and at the same time maintain American standards.

In setting up adequate provisions for subsidies for American shipping the Congress should provide for the termination of existing ocean-mail contracts as rapidly as possible and it should terminate the practice of lending Government money for shipbuilding. It should provide annual appropriations for subsidies sufficiently large to cover the differentials that I have described.[22]

Congress' response to the President's call for reform was the Merchant Marine Act, 1936. The Committee reports accompanying the bills reported to the House and Senate both expressly state that the legislation is designed to permit United States vessels to compete in foreign trade by providing construction and operating subsidies. The reports note the recommendations of the President, the Black Report, the Postmaster General, and the Committee on Shipping Policy. They also document in detail the existence of government subsidies and lower wage scales abroad. At the same time, the reports recognize that the undesirable impact on domestic trade caused by the mail subsidy program had to be eliminated.[23]

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[22] *Id.* at 1-2.

[23] S. Rep. No. 1721, 74th Cong., 2d Sess. 1-12 (1936); H. Rep. No. 1277, 74th Cong., 1st Sess. 1-18 (1935).

b. *Title V.*

Congress set out the framework of the CDS program in Title V of the Act. Title V, as enacted in 1936, is identical in most material respects to the legislation which exists today. Section 501 authorized the payment of CDS for vessels to be used in the foreign trade. Section 506 established exceptions to this general rule which are the same as those provided in the present section, except that the period in which ships could engage in nonincidental domestic trade was limited to three months, instead of six. Section 509 provided for assistance in the financing of vessels to be employed in domestic trade, but prohibited use of CDS.

Both the legislation, on its face, and the accompanying committee reports indicate that Congress intended to create a comprehensive scheme dealing with all circumstances under which CDS vessels could be used. There is not the slightest indication that vessels built with CDS could engage in domestic trade, except as provided by Section 506. Indeed, the clear intent of Congress in enacting Title V of the Act was to erect a wall of separation between the foreign and domestic trades.

The Act, as originally passed by the House, unquestionably dealt with all the circumstances in which CDS vessels would engage in domestic trade. Section 506 of H.R. 8555, passed by the House on June 27, 1935,[24] did not provide for "temporary" waivers of CDS trading restrictions. Rather, the bill allowed for permanent waivers, on the conditions that CDS be repaid and that a waiver be granted only to replace

[24] 79 Cong. Rec. 10289 (1935).

an existing unsubsidized vessel or to fill a demand for transportation which could not be met by the existing unsubsidized fleet.[25] The Section provided, in relevant part,

> (a) Every vessel in respect of which a construction subsidy has been paid pursuant to this part shall be documented under the laws of the United States, and in case of construction, shall remain so documented under such laws for not less than 20 years from the date upon which the construction of such vessel is completed or in case of reconditioning, for not less than the life expectancy of the vessel as determined by the Authority.
>
> (b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and

[25] Section 506, as passed by the House in 1935, represented a refinement of the first crude outlines of the CDS program. The roots of the program originated with the Black Report, which proposed that the mail subsidy program be replaced with a direct construction subsidy program. To protect the domestic trade, the Report suggested that all ships built with subsidy be excluded from domestic trade, unless the subsidy was repaid in full. Black Report, at 44. The initial versions of Title V introduced in both the House and Senate as part of identical companion bills incorporated the Black Report's suggestions with little modification; vessels built with CDS were prohibited from engaging in domestic trade, unless the Government permitted otherwise and CDS was repaid. No further restrictions were placed on the waiver authority. S. 2582, 74th Cong., 1st Sess. § 504 (1935); H.R. 7521, 74th Cong. 1st Sess. § 504 (1935).

shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided:

. . . .

(c) *In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.*[26]

The comprehensive nature of the statute is confirmed by the report of the House Committee on Merchant Marine and Fisheries, which provides,

> Sections 501 to 506 authorize citizens of the United States (as defined in section 2 of the Shipping Act) to apply for aid in the construction or reconditioning of vessels to be used in an essential foreign service. The Authority shall approve the application only if it finds that the service requires a new or reconditioned vessel to meet competitive conditions or to promote foreign commerce, that the proposed vessel will meet the needs of the service and the requirements of commerce, that the applicant possesses the necessary ability, experience, and financial resources, and that the granting of the aid is calculated to carry out the purposes and

[26] H.R. 8555, 74th Cong., 1st Sess. § 506(a)-(c) (1935) (emphasis added).

> policy of the act . . . . The construction-differential subsidy shall equal the excess of the American cost over the fair and reasonable cost to a principal foreign competitor . . .
>
> .
>
> *All vessels in respect of the construction of which a construction subsidy has been paid shall be documented under the laws of the United States for 20 years and shall be operated exclusively in the foreign trade. The Authority may, on certain conditions, consent to the operation of such a vessel in the domestic trade in which case the amount of the subsidy shall be repaid to the United States proportionately in accordance with formulas prescribed in section 506(b).*[27]

It is noteworthy that the House bill was much like what the petitioners and Federal parties would have the present legislation. Subsection (c) quoted above allowed the Authority to grant a permanent waiver. And subsection (d) then allowed the Authority to revoke at its pleasure a permanent waiver once granted:

> (d) Any consent given by the Authority under this section for operation other than exclusively in foreign trade may be revoked by the Authority at any time.[28]

The net result would have authorized the waiver granted the STUYVESANT and then the revocation of the waiver along with forgiveness of the balance of the note when it became opportune for the STUYVESANT to reenter foreign trade.

[27] H. Rep. 1277, at 21-22 (emphasis added).

[28] H.R. 8555, 74th Cong., 1st Sess. § 506(d) (1935).

The Senate, however, was not prepared to allow the CDS program to present to operators in the domestic trade a threat so reminiscent of the mail subsidy. The version of H.R. 8555 first reported to the Senate deleted the material found in subsections (c) and (d) of section 506 of the House-approved bill and instead limited non-incidental domestic uses of vessels built with CDS to three months in any year.[29] This provision closely approximates that found in the 1936 Act.

The Senate Commerce Committee Report on S.3500, the Senate equivalent of H.R.8555, makes quite clear that Section 506 was not limited to temporary waivers, but was to describe all permissible waivers. Indeed, the report does not even make specific mention of the three month limitation, but speaks instead in terms of permitted domestic uses. The report provides,

> Part I of this title provides for the payment by the Authority to the shipbuilder of the difference between the American and foreign cost of building such ship. The new ship must be one required for foreign commerce and suitable as a naval auxiliary . . . .
>
> *In S.3500 the granting of a construction subsidy has been limited to vessels to be engaged only in foreign commerce.* It has been urged with insistence that a construction subsidy should also be authorized for ships to be used in the joint coastwise and foreign

[29] H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported, with an amendment, July 29, 1935).

> trade. It has been urged that under some circumstances the combination of coastwise and foreign trade might permit the construction of larger and faster ships than would be justified for either of these trades separately. It is stressed, too, that these larger and faster ships might be more efficient, not only in developing our foreign commerce, but also more desirable as naval auxiliaries. If such joint coastwise and foreign trade should be authorized, it was suggested that the construction subsidy should be reduced in the same proportion that the revenues derived from the coastwise trade bear to the total revenues in the joint coastwise and foreign trade. While recognizing the merit of these contentions, your committee has felt that for the present a construction subsidy should not be authorized for the joint coastwise and foreign trade.
>
> *The bill makes an exception to cover the case of American vessels engaged in what would otherwise be foreign trade, but which call at ports of our island possessions, Hawaii and Puerto Rico. Likewise exception is made for vessels engaged in the intercoastal trade but which are also engaged in foreign trade between intermediate foreign ports.*
>
> In the latter case, however, they could be permitted to carry passengers and mail, but could not carry cargo between American ports. In each of such exceptional cases the construction subsidy would be reduced in proportion to the amount of the revenues

> derived from the domestic or protected part of such trade as compared with the entire revenue. . . .[30]

The legislative history further reveals that Congress intended that the authority to grant even a three-month waiver be exercised sparingly. At the hearings on S.3500 before the Senate Commerce Committee, the following colloquy occurred between Senator Bennett Clark of Missouri and J. M. Johnson, Assistant Secretary of Commerce:

> MR. JOHNSON. And, Senator, it does not make any difference how you write your law; it all hangs on your Authority. If you have a good Authority of integrity, industry, and skill, they will safeguard the interests of the Government.
>
> SENATOR CLARK. Our experience in this country with shipping authorities has been extremely unfortunate.
>
> MR. JOHNSON. You have got to have a good Authority.
>
> SENATOR CLARK. If we take a lesson from the past, that should be a warning against such a blanket authority.
>
> MR. JOHNSON. Those several weaknesses are taken care of in this bill, and they can only make exceptions after formal hearings and applications and determinations.[31]

[30] S. Rep. No. 1721, at 14-16 (emphasis added).

[31] *Hearings on S.3500, S.4100, S.4111, Merchant Marine Act, 1936, Before the Senate Committee on Commerce*, 74th Cong., 2d Sess. 11 (1936).

Although its purpose was apparent, section 506, as enacted in 1936, was not a model of clarity. The actual language of the section was a potpourri of phrases taken from the many bills introduced by the three major proponents of the Act, Senators Copeland, Gibson, and Guffey.[32] One passage in the section suggested that permanent waivers would be permitted upon repayment of subsidy. That passage was followed by a sentence limiting use of vessels built with CDS in domestic trade to three months in any year. Whether Congress believed that deletion of original subsections (c) concerning the granting and (d) the revocation of permanent waivers removed permanent waiver authority from the Act or that the three month clause of section 506 limited the more general waiver clause immediately preceding it is not clear. What is clear is that Congress never intended to grant an unlimited waiver authority, that the Committee reports accompanying the bill which was enacted in 1936 make no mention of permanent waivers, and that, in 1938, Congress removed the language suggesting that permanent waivers were permissible for the express purpose of making clear its intent to prohibit such waivers.

Section 506, as amended in 1938, reads virtually as it does today. The amendment made two material

[32] *See* H.R. 8555, 74th Cong. 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported with an amendment, July 29, 1935); S.3500, 74th Cong. 2d Sess. § 506 (introduced in the Senate January 6, 1936); S.3500, 74th Cong. 2d Sess. § 506 (introduced in the Senate February 24, 1935); S.4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate February 24, 1936); H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate April 24, 1936); S.3500, 74th Cong., 2d Sess. § 506 (Committee Print March 1936). These legislative proposals are set forth in an Appendix to this Brief.

changes in the section. First, the three-month limit on non-incidental domestic use was extended to six months. Second, language which could have been construed to permit other waivers of trading restrictions was deleted. The legislative history reveals that Congress deleted the language to remove all ambiguity concerning the nonavailability of permanent waivers.

The 1938 amendments to the Act were adopted at the behest of Joseph P. Kennedy, Chairman of the United States Maritime Commission.[33] Chairman Kennedy went before committees of both the Senate and the House in December 1937 to propose specific revisions of troublesome provisions in the Act. Explaining his proposed revision of section 506, Chairman Kennedy testified that the provision was inadvertently confusing on the subject of using vessels built with CDS in domestic trade, and that the section should be changed to reflect more clearly Congress' original intent to prohibit use of such vessels in non-incidental domestic trade, except for temporary emergency periods. He testified:

> *Section 506 has been entirely rewritten to remove ambiguities and confusion.* The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. *There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission*

[33] The Commission was, at that time, the authority charged with administering the Act.

> *consents to such use and the owner repays part of the construction differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine.*

As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.

If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year. If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be determined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy.

It is believed that the section as rewritten will result in improved administration

and will protect the interests of the Government and those of the carriers, both foreign and domestic.[34]

The House and Senate adopted the amendment of section 506 suggested by Chairman Kennedy. The committee reports clearly echo the Chairman's interpretation of the 1936 Act and the purpose of the revision.[35]

Chairman Kennedy's interpretation of Congress' intent in 1936 and his explanation of the action to be taken in 1938 are entitled to great deference. The Chairman headed the agency charged with administering the Act; the interpretation was contemporaneous with enactment; the Chairman was instrumental in drafting the legislation and obtaining its passage; the interpretation is consistent with the Act; and Congress ratified the interpretation. Under such circumstances, courts normally resolve legislative ambiguities in accordance with the administrator's interpretation. *See, Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Moreover, the House and Senate reports accompanying the 1938 amendments independently affirm this interpretation of the Act. These reports resolve, beyond doubt, that section 506 was designed to cover all, not just some, instances of permissible waiver. And the only waivers permitted for nonincidental domestic use were for six months or less. Longer waivers called permanent, temporary, or otherwise, simply were not permitted.

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[34] *Hearing on S.3078, Before the Senate Committee on Commerce*, 75th Cong., 2d Sess. 8-9 (1937) (emphasis added).

[35] S. Rep. No. 1618, 75th Cong., 2d Sess. 12-13 (1938); H. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938)

Although Title V has been amended on several occasions since 1938, the basic principles concerning the payment of subsidy and waiver of trading restrictions have never been altered. In 1951, the trade route concept was eliminated from Section 501.[36] This amendment was intended to permit all foreign commerce to be treated equally.[37] In 1959, the Act incorporating Hawaii into the Union amended Section 506 to retain the existing exception for trips to the Orient by way of the islands.[38] The Committee report reaffirms the general rule of exclusion, as well as the exception.[39] In 1970, Section 501 was amended to provide for CDS payments directly to shipyards.[40] The amendment was designed to make CDS more available and thereby assist a major revitalization of the subsidized fleet through increased CDS construction.[41] The general principles of subsidy payment embodied in the 1936 Act were reaffirmed in both committee reports.[42]

Petitioners' and the Federal parties' interpretation of the Act's legislative history as an endorsement of permanent waivers cannot withstand scrutiny. Petitioners and the Federal parties assert that statements in the Black Report suggesting that CDS repayment could prompt trading restriction waivers and provisions in early drafts of the Act adopting this concept prove that Congress in-

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[36] Act of July 17 1952, 66 Stat. 760, 765.

[37] *See* H. Rep. No. 2221, 82 Cong., 2d Sess. (1952).

[38] Act of March 18, 1959, 73 Stat. 12.

[39] S. Rep. No. 80, 86th Cong., 1st Sess. (1959).

[40] Merchant Marine Act, 1970, 84 Stat. 1018.

[41] H. Rep. No. 91-1073, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. (1970).

[42] H. Rep. No. 91-1073, at 17-18; S. Rep. No. 91-1080, at 9-11.

tended to permit such conduct in 1936 and 1938. *Brief for the Petitioners*, at 33-34; *Brief for the Federal Parties*, at 56-67. When these early efforts are viewed in the context of the entire evolution of section 506, culminating in 1938, it becomes clear that just the opposite is true. As the statute was refined, Congress came to realize that while subsidized operators needed some flexibility in choosing between foreign and domestic trade, unsubsidized operators could not tolerate unlimited permanent competition from vessels built with CDS. The balance struck was to remove the language permitting permanent waivers and to permit waiver of trading restrictions for three, then six, months in any year. The early inclusion in section 506 of provision for permanent waivers only confirms that the section is not silent on the subject, but is designed, instead, to prescribe the totality of permissible waivers.

Despite compelling evidence that Congress intended section 506, as finally enacted, to prohibit permanent waivers of trading restrictions on vessels built with CDS, petitioners and the Federal parties conclude that the section permits such waivers. The *only* contemporaneous authority cited for this proposition is a single statement made by Senator Guffey during hearings on the 1936 Act. According to the petitioners and the Federal parties, Senator Guffey construed section 506 to permit permanent waivers with repayment of CDS and three month waivers without any repayment. *Brief for the Petitioners*, at 36-37; *Brief for the Federal Parties*, at 58-59.

To place the Guffey statement in perspective, it must be realized that the Senator was not describing the same section 506 eventually enacted by Congress.

Rather, Senator Guffey's comments were addressed to the Committee Print of S.3500 prepared for the 1936 hearings. The Committee Print differed from the act passed by Congress in that section 506(c) limited the authority to grant permanent waivers to those cases where there were not adequate unsubidized vessels available or where an unsubsidized vessel was to be retired from service. S.3500, 74th Cong., 2d Sess. § 506(c) (Committee Print 1936). Senator Guffey expressly recognized these limitations, noting that section 506(b), as then drafted, permitted operation of vessels built with CDS in trades other than foreign, "except as later provided." *Hearings on S.3500, S.4100, S.4111, Merchant Marine Act, 1936, Before the Senate Committee on Commerce*, 74th Cong., 2d Sess. 124 (1936). Thus, the open-ended waiver authority suggested by petitioners and the Federal parties was never considered by Congress and never adopted by any member of Congress, including Senator Guffey.

In addition, Senator Guffey spoke only for himself. He did not speak for Congress, the Senate, or even the Commerce Committee. The statement cited by petitioners and the Federal parties was inserted in the hearing record solely at Senator Guffey's request and was never expressly approved by the Committee. When the Committee spoke for itself, in the form of Senate Report No. 1721, the language used was in no way similar to that of Senator Guffey.

Finally, but of paramount importance, the history of the 1938 amendment of section 506 is in direct conflict with Senator Guffey's earlier statement. Chairman Kennedy described the section's provisions on the use of vessels in domestic trade as ambiguous.

The Senator, on the other hand, had seen no ambiguity in section 506 and stated that CDS did not have to be repaid during periods of temporary emergency use in domestic trade. Congress, as evidenced by the Committee reports, agreed with the Chairman and removed the ambiguity by striking the only language in the section even remotely suggesting a power to grant permanent trading restriction waivers. Surely, the interpretation of the statute offered by Chairman Kennedy and the revisions enacted by Congress are more persuasive authority than the isolated and obsolete comments of Senator Guffey.

Petitioners and the Federal parties attempt to avoid the plain impact of the 1938 legislation by asserting that Congress was somehow misled into removing the language in the Act arguably authorizing permanent waivers. *Brief for the Petitioners*, at 44-47; *Brief for the Federal Parties*, at 61. They fail to explain why, if ambiguity existed only as to the requirement of subsidy repayment during periods of temporary emergency, it was necessary even to amend the initial sentence of section 506, which made no reference to temporary waivers, let alone to remove from that sentence the very language on which they rely. No explanation is offered because none is possible.

Their reliance on the House Report statement that the 1938 amendment made "[n]o fundamental change in the original purposes of the section," similarly fails to advance their analysis. The original purpose of section 506 was to prevent unfair competition between vessels built with CDS and the unsubsidized fleet. Thus, even if Congress intended section 506 to permit permanent waivers in 1936,

deletion of the authority in 1938 would not work a fundamental change in the section's original purpose. Of course, if, as was the case, Congress never intended section 506 to authorize permanent waivers, the 1936 amendments clearly worked no fundamental change.

Petitioners and the Federal parties also attempt to elicit support from the 1938 testimony of Edgar C. Luckenbach. Again, this serves only to prove the correctness of respondents' position. Mr. Luckenbach, an unsubsidized operator, called without success for a complete prohibition on trading restriction waivers, including three month temporary emergency waivers. Congress' rejection of this suggestion shows not that permanent waivers were permitted, but that a balance was struck between the competing interests of subsidized operators and of unsubsidized operators. The balance was not to prohibit all waivers, but to limit waivers to six months in any year.

Ultimately, the arguments of petitioners and the Federal parties prove too much. If Congress truly intended section 506 to authorize permanent waivers in 1936, and if Congress did not intend to repeal that authority in 1938, then that authority must remain in section 506 to this day. Yet, at no time in this litigation has any party even suggested that section 506 authorized the Secretary's action with respect to the STUYVESANT. Indeed, petitioners and the Federal parties look everywhere but to section 506 for such authority. They do not look to section 506 for authority because it contains none. As summarized by the Court of Appeals:

> No one in the present case . . . now contends that § 506, as amended, authorizes

permanent waivers. The trial court specifically so stated, and looked elsewhere in the statute for inherent authority in the Secretary to do this. However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.

As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in 1938 determined on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize.

Alaska Bulk Carriers, Inc. v. Kreps, Pet. App. 28a-29a.

5. The Power to Grant Permanent Waivers Is Neither Administratively Established Nor Congressionally Sanctioned.

In the face of the overwhelming clarity in Title V, and its legislative history, that CDS trading restrictions may not be waived for more than six months, petitioners and the Federal parties look for legislative intent located outside the title. They suggest that a "long-standing" agency interpretation supports the authority to waive permanently trading restrictions and that the Congress has acquiesced in this interpretation. When examined in the light of prevailing legal standards, these sources neither establish a "long-standing" agency policy on the subject nor evidence congressional acquiescence in any such policy.

The sole instance of a permanent waiver prior to amendment of the Merchant Marine Act in 1972 was the Grace Line episode of 1964. *See*, Decision of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964) (App. 172-180).[43] The remaining "precedents" cited by petitioners and the Federal parties are three purported waivers, all occurring since December 1976. *See Brief of the Petitioners*, at 51-60; *Brief for the Federal Parties*, at 65-66. Like the Grace Line waiver, none of these actions has been tested in the courts. Indeed, two of the waivers are not yet

[43] In 1958, Grace Line was granted CDS to aid in the conversion of two "break-bulk" freight vessels, originally built without CDS, to the more efficient container configuration. When Grace was subsequently prohibited by South American governments from operating the two vessels in the foreign services for which they had been intended, Grace proposed to sell the vessels to a domestic operator and repay the CDS. The Comptroller General ruled that trade restrictions could be waived if the CDS were repaid.

effective. Rather, they are contingent on legislation placing the Virgin Islands within domestic trade. The third case involved a waiver of trade restrictions to allow use of vessels in foreign to foreign trade. The vessels were LNG tankers, which, pursuant to section 905 of the Act, 46 U.S.C. § 1271, are permitted to engage in such trade even when built with subsidy. Repayment of CDS in that case permitted full 87.5 percent purchase price financing under Title XI of the Act.[44]

The four "precedents" relied on by the petitioners and the Federal parties hardly rise to the status of a "long-standing" administrative interpretation deserving judicial deference. The interpretation was not promulgated contemporaneously with the Act's passage; the agency personnel were not involved in the legislative process; the interpretation is at odds with the construction of the Act expressed by the agency through Chairman Kennedy in 1937; and the interpretation is inconsistent with the letter and spirit of section 506. *See, e.g., Zuber* v. *Allen*, 396 U.S. 168 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioners and the Federal parties nevertheless argue that, by failing to reverse the Grace Line result when amending the Act in 1970 and 1972, Congress "acquiesced" in the Secretary's interpretation of Title V. *See Brief for the Federal Parties*, at 67-69;

[44] Since CDS is limited to 50 percent of the initial price, while Title XI limits may be based on purchase price at any point within one year after completion of the vessel, it is possible for the amount of subsidy to be far less than the increased borrowing power later available under Title XI. The repayment of CDS may also be offset by tax benefits, such as the investment tax credit.

Brief for the Petitioners, at 61. But the mere fact that Congress has not responded to this action hardly entitles it to deference. This Court has made clear that to the extent congressional inaction provides support to an agency's statutory interpretation, the evidence of congressional awareness of the policy must be far greater than that evidenced here.

Petitioners' attempted reliance on *Zemel* v. *Rusk*, *supra*, well illustrates their failure. In *Zemel*, the plaintiff sought to attack a State Department regulation prohibiting validation of passports for travel to Cuba. Regulations restricting travel to specific areas dated back to 1915. During World War I, travel to several more countries was restricted. In 1926, the present passport statute was enacted, leaving the past agency practice intact. Following the 1926 act, numerous travel restrictions were enforced. Moreover, in 1938, an Executive Order expressly approving the practice was issued. The Order was still in effect at the time Zemel sought to travel to Cuba. This 50 year history of regulatory, legislative, and executive action in a highly visible area stands in stark contrast to the Secretary's ad hoc determination concerning the Grace Line.

For the same reasons, reliance on *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978), is misplaced. In endorsing a longstanding agency interpretation of its enabling act, Justice Marshall stressed both the frequent exercise of the interpretation over many years and the numerous occasions on which formal congressional reports and studies addressed the issue. 439 U.S. at 248 & n.13, 251. Again, the Grace Line episode fails to meet this standard.

What is more important, the entire excursion into the 1970 and 1972 amendments of Title XI is irrelevant as a matter of law. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *see United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 135 n.25 (1978). In *Teamsters*, this Court determined whether section 703(h) of the Civil Rights Act of 1964 permitted the continued operation of seniority systems which perpetuated the effects of past discrimination. Between 1964 and 1977, the question had been consistently answered in the negative by eight courts of appeals, numerous district courts, and an unbroken line of Equal Employment Opportunity Commission ("EEOC") opinions.[45] What is more, the conference report accompanying the 1972 amendments to the 1964 Act expressly stated that Congress intended the case law developed since 1964 to govern the interpretation of those sections of the Act which were not being amended.

The section at issue—703(h)—was not amended by the 1972 amendments. The Court construed section 703(h) in the opposite manner of the courts of appeals, the district courts and the EEOC. It dismissed the congressional acquiescence argument with the following language:

> The legislative history of the 1972 amendments to Title VII . . . in no way points to a different result . . . .
>
> [T]he assumption of the authors of the Conference Report that "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII," . . . of course does not foreclose our consideration of that issue. *More importantly, the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII,* enacted after this litigation was commenced, *are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964,* unmistakable in this case, *that controls.*

431 U.S. at 354 n.39 (emphasis added).

In light of *Teamsters*, there can be no question that the intent of Congress in 1936, when it enacted Title V, and in 1938, when it amended the relevant portions of section 506, is controlling here. The amendment of the separate Title XI in 1970 and 1972, relied on so heavily by petitioners and the Federal parties as evidence of legislative intent with respect to the waiver of CDS restrictions, is entitled to "little, if any, weight."

Relying on *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), petitioners state that in this case, unlike *Teamsters*, the 1972 legislation declared the intent of the earlier statute, and thus, should be followed. Reliance on *Red Lion* is misplaced. In that case, the declaration of policy followed by the Court appeared in section 315 of the Communications Act, 47 U.S.C. § 315(a). *See* 395 U.S. at 380. In this case, the policy declaration relied on by petitioners and the Federal parties comes not from the statute itself, but from the report of the House Merchant Marine and Fisheries Committee. In this respect, the case more

[45] *See* 431 U.S. at 378-80 (Marshall, J., concurring and dissenting); 431 U.S. at 346 n.28.

closely resembles *Teamsters*, where the policy declaration disregarded by the Court appeared in the conference committee report.

Also misplaced is reliance on NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell*, the Court deferred to an agency interpretation of the Wagner Act after Congress re-enacted the statute in the Taft-Hartley Act. No similar re-enactment of section 506 has occurred here. *See United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) (section 5 of Voting Rights Act of 1965 re-enacted in 1970, 1975); *Commissioner* v. *Noel's Estate*, 380 U.S. 678 (1965) (section 302(g) of Revenue Act of 1926 re-enacted as section 811(g) of Internal Revenue Code of 1939 and section 2042(2) of Internal Revenue Code of 1954).

The final component of petitioners' and the Federal parties' deference-acquiescence theory is that the legislative history of the 1972 amendment to Title XI, independent of the mere fact of amendment, provides insight into the meaning of Title V. But Title XI concerns solely financing guarantees. It in no way governs the CDS program. The specific provision relied on by petitioners and the Federal parties, section 1104(a)(3), provides only that repayment of CDS may be *financed*, in whole or in part, under Title XI. It makes no statement as to whether subsidy may be repaid, except by reference back to Title V,[46] and makes no statement whatsoever about lifting trading restrictions.

[46] It must again be emphasized that the issue in this case is not whether CDS may be repaid, but whether trade restrictions may be lifted. While parties must repay CDS pro tanto to engage in domestic trade, the converse is not necessarily true. Parties may wish to repay CDS for other reasons, including the opportunity for 87.5 percent financing under Title XI and freedom from American flag requirements such as employment of a United States crew. The mere repayment of CDS does not injure domestic operators. It is the lifting of trade restrictions which brings the policy issues underlying section 506 into play.

In what the Court of Appeals labeled a "singularly convoluted line of reasoning," petitioners and the Federal parties rely on language never enacted by Congress. *See Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 46a. This language purported to extend Title XI assistance to vessel owners repaying subsidy solely to engage in domestic trade. Petitioners' and the Federal parties' position depends on one ambiguous sentence in the House Report explaining the rejection of this language:

> Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayment under the first sentence of section 506 of the Act.

H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 9-10 (1972).

Petitioners and the Federal parties would have this sentence read as an approbation of the Grace Line incident. In context, it seems much more clearly to be a remark on the peculiarity of the incident and, indeed, as much a questioning as an endorsement of its soundness. What is unmistakable is that the Committee determined to leave the matter of CDS repayments to section 506 and not to use section 1104 as a vehicle for legislating on the merits, as opposed to the financing, of such repayments.

This is established by the final sentence of the House report's comment on section 1104(a)(3). This sentence, in plain unambiguous English, states that section 1104 was not in any way intended to extend or affect application of Title V. Indeed, the Senate did not consider the sentence so heavily relied on by petitioners and the Federal parties to be important enough to include in its report. The Senate report does repeat, however, the final statement of the House report that section 1104(a)(3) does not extend or affect Title V. S. Rep. No. 92-1137, 92d Cong., 2d Sess. 9 (1972).

No matter what the meaning of the House report on section 1104, it is entitled to little weight. The substantive pronouncements of a later Congress, like the mere amendment of unrelated provisions in the Act, cannot overcome the expressed intent of the Congress which enacted section 506. *See International Brotherhood of Teamsters* v. *United States, supra.*

All three prongs of petitioners' and the Federal parties' congressional acquiescence argument are further undermined by *Securities and Exchange Commission* v. *Sloan, supra,* and *Tennessee Valley Authority* v. *Hill, supra.* In *Sloan,* the SEC had, for over 34 years, interpreted the Securities Exchange Act to permit issuance of consecutive ten day suspension orders. In the intervening period, Congress had reenacted the relevant provision and the Commission participated in the redrafting of the provision. Further, the subcommittee report accompanying the amendment expressly endorsed the agency interpretation of its suspension power.[47] This Court stated, however, that this recent history could not overcome the intention of the Congress which enacted the 10 day rule in 1934. The Court explained:

> In *Zuber v. Allen* [396 U.S. 168,] 192, the Court stated that a contemporaneous administrative construction of an agency's own enabling legislation "is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12(k) to the Congress which drafted the "enabling legislation" here in question—the Securities Exchange Act of 1934.
>
> They made known to at least one committee their subsequent construction of that section 29 years later, at a time when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court. Although the section in question was reenacted in 1964, and while it appears that

[47] The Senate Committee on Banking and Currency, when it reported on the proposed 1964 amendments to the Act, stated:

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee accepts this interpretation.

S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963).

the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber*, *supra*.

> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which is not only at odds with the language of the section in question and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

436 U.S. at 120-21.

In this case, the agency similarly did not make its interpretation of section 506 known to Congress during the enactment process. To the contrary, the interpretation offered by Chairman Kennedy in 1937 is diametrically opposed to the Secretary's present stance. Further, the purpose of Congress in amending Title XI in 1972 was not to provide power to waive trading restrictions, but to provide a program of government guaranteed borrowing. Thus, "the Congress was focused on issues not directly related to the one presently before the Court." Finally, awareness of the Secretary's practice is manifested, at best,

by only one congressional subcommittee, and the practice vests "virtually untrammeled and unreviewable power . . . in a regulatory agency." *Sloan* applies to this case with full force.

In *Tennessee Valley Authority* v. *Hill*, *supra*, there was overwhelming evidence of Congress' approval of the agency's interpretation of the Endangered Species Act. Despite evidence that the snail darter would be wiped out by the dam project, Congress appropriated an additional $29 million to complete the project in 1975. In 1976, after the District Court for the Eastern District of Tennessee ruled that the Endangered Species Act did not preclude completion of the project, Congress appropriated an additional $9 million for the dam's completion. The Senate Appropriations Committee report expressly endorsed the District Court's construction of the Act. S. Rep. 94-960, 94th Cong., 2d Sess. 96 (1976). In 1977, after the Court of Appeals for the Sixth Circuit reversed the District Court, Congress again directed that the project be completed. The House Appropriations Committee stated,

> It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced state of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.

H.R. Rep. No. 95-379, 95th Cong., 1st Sess. 104 (1977).

The Senate Appropriations Committee stated,

> This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which

were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.

S. Rep. No. 95-301, 95th Cong., 1st Sess. 99 (1977).

This Court, relying on *Sloan*, dismissed these expressions of Congressional intent. 436 U.S. at 192. The legislative analysis of petitioners and the Federal parties should likewise be dismissed.[48] As this Court stated in *Sloan*,

> [T]he existence of a prior administrative practice, even a well-explained one, [does not] relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.
>
> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291" *Volkswagonwerk* v. *FMC*, 390 U.S. 261, 272 (1968).

Securities and Exchange Commission v. Sloan, 436 U.S. 103, 118 (1978); *see Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

[48] The Federal parties rely on a 1978 amendment to Title XI as further evidence of Congressional acquiescence in the Grace Line precedent. *See Brief for the Federal Parties*, at 20. This amendment had nothing whatsoever to do with repayment of CDS. The act provides, *in full*,

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that section 509 of The Merchant Marine Act, 1936, as amended (46 U.S.C. 1159), is amended by striking the words "fourteen knots" in the fourth sentence, and inserting in lieu thereof the words "ten knots".

P.L. 95-505, 92 Stat. 1755.

The purpose of this Act is to extend Title XI assistance available under section 1104(b)(2) of the Act to Great Lakes vessels. This was accomplished by lowering the minimum vessel speed requirements in section 509 of the Act, which section 1104(b)(2) incorporates by reference. Great Lakes vessels need not be as swift as ocean-going vessels and, thus, are not in all instances built to operate at 14 knots. See H. Rep. No. 95-1528, 95th Cong., 2d Sess. 1, 3 (1978). Mention of subsidy repayment in the report accompanying this amendment occurs only because section 1104(b)(2) always mentioned such repayment. The report merely paraphrases the statute while describing the status quo. As already noted, subsidy repayment is not the issue here. With respect to Great Lakes vessels, the issue of subsidy repayment never arises. Such vessels, specially designed for the domestic trades, would not have been constructed with subsidy. There is no suggestion in the amendment or the legislative report that ocean-going vessels built with CDS would repay subsidy to enter the Great Lakes trade. Indeed, since these vessels would originally have been designed for the foreign trade, they could have satisfied the 14 knot requirement and would receive no benefit from the 1978 amendment.

6. The Permanent Waiver of Trading Restrictions Will Disrupt the Domestic Trade.

As noted at the outset of this brief, the entire economics of the domestic trade is based on the premise that it will not be invaded by the multitude of vessels built with CDS. This stark reality undermines the fundamental policy rationale offered by petitioners and the Federal parties, that full repayment of CDS erases all consequences of the original CDS payments. If petitioners and the Federal parties prevail here, persons contemplating construction of vessels for domestic trade will be forced to begin the long vessel construction period[49] in a state of extreme uncertainty. As it is, the owner, and his lenders, must take the risk that their market projections prove accurate five years later. It is unlikely in the extreme that prospective owners and lenders will be willing to take such a risk when they know that the Secretary may, at any time, flood the domestic trade with vessels built with CDS.

The need to protect the domestic trade from competition with vessels built with CDS, even after subsidy repayment, was recently recognized by the Federal parties own spokesman. Testifying before Congress on a bill which would permit permanent waivers, Samuel B. Nemirow, Assistant Secretary for Maritime Affairs, stated,

> Mr. Chairman, the owners of Jones Act ships, who have undertaken significant investment risk to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships built for the foreign trade with the advantage of construction subsidy. We believe the Bill should explicitly acknowledge the interests of the domestic operators and that it should contemplate the adoption of equitable regulations to govern the conditions under which subsidized ships might be permitted to enter the domestic trades.

Hearings on Titles III, IV, and V of H.R. 4769, Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, 96th Cong., 1st Sess., Statement of Samuel B. Nemirow 29 (September 5, 1979).

Whether or not the Assistant Secretary's proposal is well taken is a matter for Congress to decide. Whatever the wisdom of his proposal, the unlimited waiver power argued for in this case provides none of the safeguards recommended by Assistant Secretary Nemirow. Thus, there is strong policy justification for the per se prohibition against permanent waivers incorporated in section 506.

The manner in which the Secretary has treated the question of interest repayment in this case further demonstrates the need for a per se prohibition against permanent waivers. When first granting Seatrain's request for a permanent waiver, the Secretary concluded that interest need not be repaid for the approximately five year period during which CDS monies were held by the shipyard. Such interest clearly constitutes additional subsidy and, thus, must

[49] The period from execution of the construction contract to delivery usually lasts three to five years for a vessel of the STUYVESANT type and size. Obviously, the decision to commit resources to the vessel must be made some time prior to execution of the contract.

be recovered, even under the Federal parties' construction of the Act. Yet the Secretary steadfastly defended her decision not to recover this money first before the District Court, then in the January 6, 1978 decision on competitive effect, and finally before the Court of Appeals. In her petition for rehearing by the Court of Appeals en banc, and in this Court, the Secretary asserts an intention to recover the interest. *Brief for the Federal Parties*, at 54 n.59. That the Secretary could make so wrong a determination on this simple question and then defend that decision time and time again argues persuasively against awarding her the broad discretion she seeks. General agency expertise cannot be let to run free.[50] There is simply a point at which Congress must set firm rules. Such a rule is contained in Section 506.

Petitioners' contention that competition from subsidized vessels operating under temporary waivers upsets market projections in the same manner as permanent waivers is plainly incorrect. Six month waivers are awarded only after the Secretary determines that all subsidized vessels are employed and that additional tonnage is required. 46 C.F.R. Part 250. Thus, the six month waiver provision affords the Secretary the flexibility to prevent shortages of tanker supply in the domestic trade, while adequately protecting the unsubsidized fleet. Permanent waivers afford neither flexibility nor protection.[51]

[50] The unfettered discretion requested by the Federal parties would amount to an unconstitutional delegation of the legislative power to the executive. *See A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

[51] As the Secretary admits, it is not possible to assess the competitive impact of a permanent waiver for the entire useful life of a vessel. The Secretary eschews any ability to foresee competitive conditions beyond three years. *See T.T. STUYVESANT- Repayment of CDS, Operations in Jones Act Trade, supra*, (App. 566, 583-84). The Court of Appeals correctly observed that the inability to assess fully the impact of permanent waivers counsels strongly against their use. *Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 16a-19a.

The Federal parties' contention that the expiration of trading restrictions on vessels built with CDS after 20 years is the functional equivalent of subsidy repayment is similarly flawed. *See Brief for the Federal Parties*, at 52, 63 n.67. The proposition that trading restrictions expire after 20 years is of questionable validity. The sole support cited for the proposition is a proposed amendment to Title V which was never enacted. Even if the proposition were correct, however, it proves nothing. Twenty years constitutes the projected "useful life" of a tank vessel. Thus, its entry into domestic trade after 20 years would, by definition, have, at best, a *de minimis* competitive impact.

The suggestion that limiting domestic trade to unsubsidized vessels unfairly restricts competition is spurious. The very purpose of the Jones Act is to create a protected market, and section 506 is designed to preserve this market. Respondents' presence in the protected trade hardly makes them monopolists. They simply made the sound business judgment to build unsubsidized vessels for delivery in 1977. Anyone else, including petitioners, could have done so at the same time. Anyone, including petitioners, could do so in the future. Indeed, elementary economics may dictate that others will enter the trade in competition with respondents. But any such

entrant will do so in the manner intended by Congress, through the construction of vessels without subsidy.

Petitioners' and the Federal parties' assertion that the STUYVESANT waiver should be upheld because it prevented an American vessel from going into lay up is curious. Substantial numbers of United States built subsidized vessels are presently in lay up despite the Secretary's use of the permanent waiver power. Several of these vessels had applications for six month waivers pending at the very moment the STUYVESANT was admitted to the domestic trade. The owner of one of these vessels vigorously opposed the permanent waiver during the Secretary's consideration of this matter on remand. *See T.T. Stuyvesant-Repayment of CDS*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. Comm. January 6, 1978) (App. 566). While petitioners understandably favor employment of the STUYVESANT over other vessels, it is difficult to discern how such discrimination furthers the maritime policies of the United States.

Unable to provide a persuasive maritime rationale for the Secretary's actions, petitioners and the Federal parties offer several more general justifications. These justifications all revolve about the plight of the Seatrain shipyard and, consequently, are lacking in appeal. Petitioners' problems are solely the result of their own making. While vessels are usually built to the order of an independent purchaser, Seatrain built the four vessel series including the STUYVESANT on speculation that purchasers engaged in foreign trade would materialize. CDS is intended as a subsidy to shipyards in the sense that it

enables American yards to compete with foreign yards. It is not to be used to insure shipyards against the consequences of managerial miscalculation. That the United States may lose money from these miscalculations as well, a dubious proposition in itself,[52] hardly justifies overriding section 506 and ignoring sound maritime policy.

B. THE COURT OF APPEALS HAD JURISDICTION

1. Introduction

Respondents initiated this lawsuit not merely to bar the STUYVESANT from domestic trade but to challenge the Federal parties' claim of authority to waive permanently trading restrictions on vessels built with CDS. To that end, Respondents alleged in their complaints that the Secretary's actions were contrary to the Merchant Marine Act, 1936. *Verified Complaint (Shell)*, ¶ 33, p. 9 (App. 14-15); *Complaint (Alaska Bulk Carriers)*, ¶ 42 (App. 61-62). Respondents prayed for a judgment declaring that the Secretary lacked authority to waive permanently trading

[52] As already noted, the parent of petitioners, Seatrain Lines, Inc., guaranteed the bareboat charter payments with respect to the STUYVESANT. Thus, if the vessel is removed from domestic trade, and can find no other employment, Seatrain Lines, Inc. will simply pay the funds necessary to prevent a default on the bonds guaranteed by the United States and on the promissory note payable to the Secretary of Commerce. Seatrain Lines, Inc. is a publicly held corporation with substantial assets. There is no indication that it could not meet its obligations. The United States indicates that prior to the closing transaction it had not secured a guarantee from Seatrain Lines, Inc. with respect to the shipyard's obligations. If that were true, and if such collateral as was required could not make the United States whole, the permanent waiver is no more than a vehicle for rectifying a serious oversight by the United States.

restrictions and for an order permanently enjoining defendants from exercising such authority. *Verified Complaint (Shell)*, p. 10 (App. 15-16); *Complaint (Alaska Bulk Carriers)* (App. 82-84, 87-91). On November 22, 1977, the District Court entered an Order which granted summary judgment for the Federal parties and petitioners and against respondents on these claims. The Order also granted summary judgment for respondents on the claim that the Secretary improperly exercised her authority and vacated the Secretary's determination. (App. 556). On November 30, 1977, the District Court implemented its decision by directing "that *final* judgment be . . . entered with respect to all *claims* decided by the Court . . ." (App. 558, 559) (emphasis added).

The Federal parties' contention that the District Court Order of November 30, 1977 was not appealable can be disposed of with relative ease. Regardless of the Secretary's decision in the remand proceeding, the judgment entered pursuant to the November 30 Order finally determined respondents' claim for an injunction against the Secretary's permanent waiver authority. The judgment could collaterally estop respondents from ever again litigating the authority issue. It is, with District Court certification, properly appealed under Rule 54(b) of the Federal Rules of Civil Procedure. Without respect to certification, it is properly appealed under section 1292(a)(1) of Title 28, United Stated Code. Finally, the judgment independently meets the tests for appealability under section 1291 of Title 28.

2. Rule 54(b) Supports The Appeal

Rule 54(b) of the Federal Rules of Civil Procedure permits the appeal of orders adjudicating at

least one claim, but less than all claims, in a case. The rule is properly invoked where the District Court disposes of one or more separate claims, orders entry of final judgment, and certifies that there is no just reason to delay an appeal. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-37 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 450-53 (1956); *see Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976). That the claim or claims decided arise from the same transaction as the claim or claims not decided in no way undermines a certification under the rule. *Cold Metal Process Co. v. United States Engineering & Foundry Co., supra*, at 452.

Certification under Rule 54(b) was plainly available to the District Court here. The November 22, 1977 Order, granting summary judgment for the Federal parties on the discrete question of the Secretary's legal authority and finally denying respondents' claims for a declaratory judgment and permanent injunction, resolved separate claims for relief. Adjudication of these claims is a prerequisite to adjudication of the claim remanded to the Secretary, but is in no way dependent upon the outcome of the remand.

The Federal parties' contention that the District Court did not adjudicate a claim, but only a theory of recovery, cannot withstand scrutiny. The remand proceeding ordered by the District Court could not have afforded respondents the ultimate relief they sought on the claims which the District Court decided and certified for appeal under Rule 54(b). The remand would not in any way affect the District Court's holding that the Secretary had authority to

waive permanently trading restrictions. Similarly, the remand could not have resulted in a permanent injunction against the Secretary. At most, the Secretary could have been enjoined from waiving restrictions on one vessel at one point in time. Respondents would, consequently, be confronted with the prospect of participating in an endless series of proceedings in which petitioners and other subsidized operators sought permanent entrance to the domestic trade. Shell would have continued to litigate before the Court of Appeals the question of the Secretary's authority to contemplate permanent waivers, even had she concluded on remand not to grant the waiver requested for the STUYVESANT.

The Federal parties essentially concede that the remand would not provide respondents the full relief requested in the complaint. They assert, however, that continued litigation of the Secretary's authority to grant permanent waivers would not present a concrete controversy. They argue that if respondents prevailed in the remand proceeding, they would have to await the next permanent waiver application to litigate the authority question. *Brief for the Federal Parties*, at 31 n.31.

In their zeal to protect the concept of finality, the Federal parties overlook a most fundamental finality principle, collateral estoppel. Respondents have had their day in court on the issue of the Secretary's permanent waiver authority, and, at the District Court level, they lost. If they were not to attack the District Court's judgment on direct appeal, respondents' future efforts to litigate the issue of the Secretary's authority would run head long into an assertion of collateral estoppel. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 329-30 (1971); *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897).[53] The impact of the District Court's judgment on future challenges by respondents preserves the concreteness of the controversy before the Court of Appeals. That the respondents confronted the final loss of their ability to challenge the Secretary's waiver authority, even if they prevailed on remand, surely proves the separate nature of their claims.

What is more, the Federal parties' attempt to litigate the distinction between separate claims and separate theories is contrary to the fundamental purposes of Rule 54(b) and should not even be countenanced. This Court, in the watershed cases of *Sears Roebuck & Co.* v. *Mackey*, *supra*, and *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, *supra*, explained that Rule 54(b) was amended in 1946 precisely to preclude esoteric debate over what constituted separate claims. The Court noted that such debate, which occurred often when under the original Rule 54(b), served only to waste judicial resources and to create uncertainty in the minds of litigants as to when their rights to appeal came into being. Rule 54(b), as now written, provides certainty by placing certification in the control of the District Court. As stated by the Court in *Mackey*,

> [The 1939 version of Rule 54(b)] gave limited relief. The courts interpreted it as not relaxing the requirement of a "final decision" on each individual claim as the basis for

[53] The District Court's holding with respect to the Secretary's authority would also constitute *stare decisis*. This would impact on other persons wishing to challenge the Secretary's authority.

an appeal, but authorizing a limited relaxation of the former general practice that, in multiple claims actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them. Thus, original Rule 54(b) modified the single judicial unit theory but left unimpaired the statutory concept of finality prescribed by § 1291. However, it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Largely to overcome this difficulty, Rule 54(b) was amended, in 1946, to take effect in 1948.... In this form, it does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case....

> To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure.... A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this certification has been made.

351 U.S. at 433-36 (footnotes omitted).

Justice Burton, speaking for the Court, went on to emphasize that the appellate courts should not second guess District Court determinations of what constitutes a separate claim. Rather, these courts should defer to the District Court unless the certification appears to be a clear abuse of discretion. Justice Burton drove the point home by recognizing that in the case then before the Court the separate nature of the certified claims was in doubt, but that, thankfully, the Court was spared agonizing over the question:

> While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54(b), *there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court. Thus the instant case affords an excellent illustration of the value of the amended rule which was designed to overcome that difficulty.* Assuming that the

> requirements of the original rule are not met in this case, we nevertheless are enabled to recognize the present appellate jurisdiction of the Court of Appeals under the amended rule. The District Court *cannot*, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals.

351 U.S. at 437 (emphasis in first two sentences added).

The certification by the District Court here can in no way be considered an abuse of discretion. By certifying an immediate appeal, the court avoided devoting its own and the parties' resources to adjudicating whether the Secretary properly exercised her discretion to waive permanently trading restrictions with respect to the STUYVESANT until the scope of the Secretary's authority was finally settled. It also ensured that this important legal issue would be reviewed with expedition, and it eliminated uncertainty as to whether the adjudication of the cross-motions for summary judgment was

otherwise appealable as a final order. That the certification created some risk of a second appellate proceeding hardly renders it an abuse of discretion. Indeed, this risk is no more grounds for vacating the Court of Appeals' decision than is the fact that the Federal parties, who let the appeal go forward without objection, did not prevail on the merits.

Although the Federal parties cite several cases concerning the nonappealability of orders involving a remand to an agency, in not one of those cases did the District Court enter a Rule 54(b) certificate. *See Brief for the Federal Parties*, at 29, 31. And while the Federal parties cite several cases in which an appeal pursuant to Rule 54(b) was not heard, not one involved either a remand or the grant of summary judgment against the appellant which would preclude the award of relief requested in the complaint. *See id.*, at 42 n.46.[54] The remand here may make a rule 54(b) certification necessary. It hardly makes one improper.

3. Section 1292(a)(1) of Title 28, United States Codes Supports the Appeal.

Regardless of certification under Rule 54(b), the District Court's Order of November 22, 1977 was independently reviewable under Section 1292(a)(1) of Title 28, United States Code. This provision permits appeal from *interlocutory* orders which "touch on the merits" of a claim by denying requests for injunctions. *Switzerland Cheese Ass'n, Inc.* v. *E.*

[54] In *McNellis* v. *Merchants National Bank and Trust Co.*, 385 F.2d 916 (2d Cir. 1967), the District Court had narrowed the remaining possibility for obtaining relief, but that part of its order was not covered by the Rule 54(b) certification.

Horne's Market, Inc., 385 U.S. 23, 25 (1966); *see Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-45 (1976). The granting of summary judgment for the Federal parties and against respondents, and the consequent denial of injunctive relief, falls within this provision. Section 1292 (a)(1) applies to denials of permanent, as well as preliminary, injunctive relief when the order denying the injunction does not end the litigation. *See, e.g., Ackerman-Chillingworth* v. *Pacific Electrical Contractors, Ass'n*, 579 F.2d 484, 489 (9th Cir. 1978), *cert. denied*, 439 U.S. ___, 99 S.Ct. 872 (1979); *McGill* v. *Parsons*, 532 F.2d 484, 485 n.1 (5th Cir. 1976); *EEOC* v. *International Longshoreman's Ass'n*, 511 F.2d 273, 276 (5th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975); *Murphy* v. *Landsburg*, 490 F.2d 319, 320 n.2 (3d Cir. 1973), *cert. denied*, 416 U.S. 939 (1974).

The attempted distinction between claims and theories of recovery in no way removes the District Court's Order from the coverage of Section 1292(a)(1). There can be no question that the injunction denied by the District Court differed from that which could have resulted from the remand. The fact that the remand could have provided respondents some relief is immaterial.

The cases concerning remands relied on by the Federal parties are, again, inapposite. *See Brief for the Federal Parties*, at 29, 31. Only *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972), involved an appeal under section 1292(a)(1). In *Pauls*, the District Court granted plaintiffs preliminary injunctive relief and orderd further agency proceedings. The Court of Appeals refused to reach the merits of defendant's appeal from the remand, but it

fully reviewed the award of injunctive relief. Far from supporting the Federal parties, *Pauls* supports appellate review of the merits here.

Only three more of the remand cases cited by the Federal parties involved claims for injunctive relief. In *Bachowsky* v. *Usery*, 545 F.2d 363 (3d Cir. 1976), the District Court ordered a remand without reaching plaintiff's claim for an injunction. The remand order was appealed not by the plaintiff, but by the defendant. The sole ground for appeal asserted by the defendant was section 1291 of Title 28. Thus, this case provides no insight into section 1292(a)(1). Similarly, in *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 583 (1974), the Court of Appeals reviewed an order granting injunctive relief. The court, however, based its jurisdiction on section 1291 of Title 28.

In *Boston & Maine R.R.* v. *United States*, 358 U.S. 68 (1958), plaintiffs sought to set aside an adjudication by the Interstate Commerce Commission ("ICC"). Plaintiffs claimed that the ICC could proceed only by rulemaking. Without deciding whether the ICC could proceed by adjudication, the three-judge district court vacated the ICC order and instructed the agency to compile a more complete record. Prior to the remand, plaintiffs appealed the question of whether the ICC could proceed by way of adjudication. Three factors are highly significant: (1) the District Court did not enter judgment against the plaintiffs on any claim, (2) the remand proceeding could have afforded the plaintiffs the precise relief requested in their complaint with respect to rates, and (3) the remand proceeding could

have been conducted as a rulemaking, thereby mooting the precise issued appealed. Here, (1) the District Court entered judgment against respondents, (2) the remand could not have provided respondents the full injunctive relief requested, and (3) the remand could in no way modify the District Court's holding that the Secretary has authority to grant permanent waivers. *Boston & Maine R.R.* in no way argues against appeal in this case.

The Federal parties cite many additional cases involving section 1292(a)(1), but none involve the award of summary judgment against the appellant. Moreover, in each of these cases the appellant could have, through additional proceedings, obtained the precise relief requested. *See Brief for the Federal Parties*, at 44-48.[55]

Finally, the Federal parties attempt to insert in section 1292(a)(1) a requirement of irreparable harm. The attempt must fail. No such requirement exists in the statute and no such showing is necessary. The section is concerned only with appealability. The Federal parties also overlook the facts that the respondents have now suffered the illegal presence of the STUYVESANT in the domestic trade for over two years, and that the District Court's Order, until overturned, would have estopped any collateral attacks on the Secretary's authority.

[55] *Goldstein* v. *Cox*, 396 U.S. 471 (1970), also differs in that it involved an appeal from a three-judge court under 28 U.S.C. § 1253. The Court expressly noted that the standards for appeal of injunctions under section 1253 differed from those under Section 1292(a)(1). 396 U.S. at 475-76.

4. The Appeal Is Consistent With Section 1291 of Title 28, United States Code.

The Federal parties devote the bulk of their argument to disputing whether the case was finally decided for purposes of Section 1291 of Title 28, United States Code. This is largely beside the point. Rule 54(b) requires a final order as to a claim, but does not depend on a final disposition of the case. Section 1292(a)(1) requires only a denial of injunctive relief. Not one case cited by the Federal parties even remotely suggests that a remand necessarily precludes either of these forms of appeal. Indeed, the cases cited suggest that the Order in this case was independently appealable under Section 1291.

The cases involving remand orders relied on by the Federal parties fall into three categories: (1) those in which the defendant agency appealed prior to the award of full relief to the plaintiff,[56] (2) those in which no final order was entered on any claim and the plaintiffs were, consequently, still in a position to obtain full relief,[57] and (3) those in which the order resolved an issue of law and the appeal was enter-

[56] *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976); *Barfield* v. *Weinberger*, 485 F.2d 696 (5th Cir. 1973).

[57] *Boston & Maine R.R. v. United States*, 358 U.S. 68 (1958); *Giordano* v. *Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Silver* v. *Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Dalto* v. *Richardson*, 434 F.2d 1018 (2d Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); *United Transportation Union* v. *Illinois Central R.R.*, 433 F.2d 566 (7th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

tained[58] *See Brief for the Federal Parties*, at 29-31.[59] The cases in the first category have no relevance here, where the plaintiffs appealed entry of judgment against them. The cases in the second category are also inapposite, since respondents cannot obtain full relief through the remand. The cases in the third category suggest that the Federal parties are simply wrong.

The final order rule is not required by the Constitution and, thus, may be judicially modified when justice so requires. In recognition of this elementary principal, this Court has counseled that finality is to be given a practical rather than a technical construction. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The practical construction of the finality standard has resulted in appellate review of orders remarkably similar to that at issue here. In *Ringsby Truck Line, Inc.* v. *United States*, *supra*, the court

[58] *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).

[59] *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978), did not involve a remand to the agency. The Court granted summary judgment on the question of liability and requested the agency to produce documents reflecting the amount of damages owed the plaintiff. The agency did not submit the documents and appealed. This case stands for nothing more than the proposition that partial summary judgment as to liability is not a final judgment.

reviewed an order vacating an ICC rate order and remanding for calculation of appropriate restitution to affected shippers. The court observed,

> While it is true that the three-judge court vacated the ICC order and remanded the case "for such further proceedings as may be appropriate," our refusal to entertain this appeal on grounds of nonfinality would elevate form over substance. Although the court below did not address itself to the issue of the shippers' restitutionary counterclaim, it is clear that any right to restitution is dependent upon the validity of an ICC rate cancellation order which has twice been set aside by a three-judge district court. In fact both parties to this appeal agree that the judgment of the court below is final with respect to the validity of the ICC order. The ICC has taken no further action on the remand (an entirely understandable position in view of the fact that the rate increase which its order sought to cancel has been superseded). Any future action for relief brought by the shippers before a single judge would necessarily be subject to dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, the judgment of the three-judge court below is indisputably final.

The finality requirement of 28 U.S.C. § 1291 is meant to be given a practical rather than technical effect. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct.

> 1221, 93 L. Ed. 1528. To deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review. We are aware that under normal circumstances a remand to an administrative agency for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291. Boston & Maine R.R. v. United States, 358 U.S. 68, 79 S.Ct. 107, 3 L.Ed.2d 34; Pauls v. Secretary of the Air Force, 1 Cir., 457 F.2d 294. But we are unable to apply this rule where, as here, to do so would violate basic judicial principles.

490 F.2d at 624.

Other courts of appeals have also reviewed orders which, in part, remanded matters to an agency where the denial of immediate review could permanently impair the appellant's rights. *See, e.g., Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978)(on rehearing); *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds*, 402 U.S. 389 (1971).

In this case, the order granting summary judgment in favor of the Secretary's waiver authority was the District Court's last word on the subject. Thus, as a practical matter, that portion of the case was concluded. Moreover, the order could have estopped collateral attacks on the Secretary's waiver authority, thus making direct review imperative. It is clear that no authority relied on by the Federal parties precludes the appeal taken here. It is also clear that substantial authority exists for finding the District Court's Order appealable, regardless of the Rule 54(b) certification or the fact that injunctive relief was denied, under section 1291.

CONCLUSION

For the reasons stated herein, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

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H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported with an amendment July 29, 1935)

SEC. 507. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority.

(b) No vessel (for the construction of which any subsidy has been paid pursuant to this Act) shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a ship, for the construction of which any subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of this temporary or emergency period, such period not to exceed three months.

(c) All payments required to be made under this subsection shall be credited to the construction fund, as hereinafter defined.

(e) The owner of any vessel constructed under the provisions of this part shall, if requested by the Authority, carry insurance payable to the Authority in addition to any insurance required to be carried by section 11 (g), as amended, of the Merchant Marine Act, 1920 (U. S. C., Supp. VII, title 46, sec. 870 (g)), in an amount equal to the unamortized amount of

any construction-differential subsidy paid on such vessel. For the purpose of this section the amount of such construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority shall upon request of the owner provide for the payment of the premium for such additional insurance, either through an operating differential subsidy or otherwise.

S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate January 6, 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided.

(1) In respect of the time such vessel shall be operated exclusively in coastwise trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel as such time bears to the entire economic life of such vessel, together with interest at 3⅓ per centum on such portion of such amount as remains at any time unpaid and not overdue, and when overdue at the rate of 4½ per centum per annum. Such amount shall be paid in periodic installments of such sums as the Authority may direct,

except that the Authority shall require the whole of such amount to have been paid at the end of the economic life of such vessel.

(2) In respect of the time such vessel shall be operated in joint coastwise and foreign trade there shall be determined an amount which bears the same ratio to the construction differential subsidy paid in respect to such vessel as such time bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the coastwise portions of such joint coastwise and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502 (b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503 (b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity

insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any overdue interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof paid to the Authority shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.

S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate February 24, 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) Except as otherwise provided in this subdivision no vessel for the construction of which any subsidy has been paid pursuant to this Act shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the

vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a vessel for the construction of which any subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period shall not exceed three months.

For the purposes of this subdivision and of subdivision (e) of section 522, the carrying of cargo, mail, or passengers between a domestic port and a port in any island territory or island possession of the United States shall be considered "semiforeign" trade if the stop at such island port is an intermediate stop on what would otherwise be a voyage in foreign trade. The Authority is also empowered to declare that the carrying of passengers and mail only in the intercoastal service, by American ships in foreign trade between ports of the Atlantic and Gulf seaboard and the Pacific seaboard of the United States shall be regarded as semiforeign trade within the meaning of this subdivision and subdivision (e) of section 522. A vessel for the construction of which a subsidy has been paid pursuant to this Act may engage in joint foreign and semiforeign trade (1) with the written consent of the Authority, (2) upon agreement tc pay to the United States an amount determined as hereinafter provided, and (3) after furnishing a bond or other security satisfactory to the Authority to secure such payment. There shall be determined the amount which bears the same ratio to the construction-differential subsidy paid in respect to such vessel as any period during which the vessel is operated in joint semiforeign and foreign trade bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the semiforeign portions of such joint semiforeign and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction-differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502 (b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503 (b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any over-due interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction-differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof recovered by the Authority as part of the purchase price shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction

subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.

S. 4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate February 24, 1936)

SEC. 27. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage which includes intercoastal ports of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall pay to the Commission an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period not to exceed three months.

H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate April 24, 1936)

SEC. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop (1) at an island possession or island territory of the United States, or (2) in the Panama Canal Zone, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall

agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

S.3500, 74th Cong., 2d Sess. (Committee Print, March 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) Except as otherwise provided in this subdivision no vessel for the construction of which any subsidy has been paid pursuant to this Act shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a vessel for the construction of which any

subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period shall not exceed three months.

For the purposes of this subdivision and of subdivision (e) of section 522, the carrying of cargo, mail, or passengers between a domestic port and a port in any island territory or island possession of the United States shall be considered "semidomestic" trade if the stop at such island port is an intermediate stop on what would otherwise be a voyage in foreign trade. A vessel for the construction of which a subsidy has been paid pursuant to this Act may engage in joint foreign and semiforeign trade (1) with the written consent of the Authority, (2) upon agreement to pay to the United States an amount determined as hereinafter provided, and (3) after furnishing a bond or other security satisfactory to the Authority to secure such payment. There shall be determined the amount which bears the same ratio to the construction-differential subsidy paid in respect to such vessel as any period during which the vessel is operated in joint semidomestic and foreign trade bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the semidomestic portions of such joint semidomestic and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction-differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502(b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential

subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503(b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any overdue interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction-differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof paid to the Authority shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.

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IN THE

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OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, et al.,
Petitioners,

v.

SHELL OIL COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION

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BRIEF FOR THE RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION

STATUTES OR RULES INVOLVED

The relevant statutes in addition to the statutes and rule reprinted in the appendices of the brief for the petitioners and brief for the federal parties are set forth in the appendix, *infra,* 1a - 6a.

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction under Rule 54(b) of the Federal Rules of Civil Procedure, 28 U.S.C. § 1291, or 28 U.S.C. § 1292(a)(1), to review a district court order entered under Rule 54(b) which finally determined one claim for relief, denying permanent injunctive relief as to that claim; remanded for further administrative determination a second claim which, however determined, could not have afforded plaintiffs the full relief sought in the complaint; and dismissed the case.

2. Whether the Secretary of Commerce may permit a vessel built with construction-differential subsidy to serve permanently in the domestic trades, upon repayment of subsidy or upon any other conditions, where the statute expressly prohibits such service except for six months in any year.

3. Whether, if the answer to the second question is affirmative, the Secretary of Commerce has the authority to accept a promissory note in lieu of subsidy repayment, thereby making a loan of the subsidy originally paid, where the conditions under which the statute authorizes the Secretary to make loans for the construction of vessels have not been satisfied.

COUNTERSTATEMENT OF THE CASE

Respondent Alaska Bulk Carriers, Inc. (hereafter, "ABC") charters and operates three U.S. tankers, all built without construction-differential subsidy (hereafter, "CDS"). By design, the ships are suited to the carriage of oil from Alaska to the U.S. west coast or to transshipment facilities on the west coast of Panama. The vessels are too large for transit through the Panama Canal or for use in any other domestic trade. All of the vessels are used to carry oil from the trans-Alaska pipeline under a three year agreement with the Standard Oil Company (Ohio) (hereafter, "Sohio"), which ends in 1980. After 1980, two of the vessels will not be employed unless domestic charters are found. The management decision to build these three vessels was based on their use in the Alaskan oil trade (A. 86-87).

Respondent Trinidad Corporation (hereafter, "Trinidad"), a wholly owned subsidiary of Barber Oil Corporation, was formed in 1944 to operate and manage a fleet of U.S. flag tankers under charter to major oil companies. In 1976, in implementation of a plan by Trinidad's parent to become a major carrier of Alaskan crude oil, Trinidad purchased all the capital stock of Mathiasen's Tanker Industries, Inc. which held three large U.S. flag tankers under long-term charters, and contemporaneously purchased an interest in ABC. These acquisitions were financed through a multimillion-dollar bank loan. One of the three vessels which Trinidad acquired through purchase of Mathiasen's Tanker Industries, Inc. is currently subchartered to ABC. Trinidad is also the owner of five smaller U.S. flag tankers, four of which are under

transportation contracts with a major oil company (A. 82-83). None of the eight U.S. flag tankers owned or on long-term charter by Trinidad was built with CDS (A. 83).

In the late 1960s and again in the 1970s, the prospect of increased demand for large tankers to carry Alaskan oil to the U.S. encouraged the investment of private capital for unsubsidized tanker construction. Projections with respect to Alaska oil output and methods of delivery were continuously made both by investors and potential investors in delivery systems (A. 83-84) and by the Government in respect of its energy programs. Investors proceeded on the basis that tankers built with CDS, or under construction with CDS, were barred from the carriage of such oil other than for six months in any year (A. 83). The Government's development programs proceeded on the same basis. For example, an exhaustive study published in April, 1977, undertaken by the Federal Energy Administration at the request of Congress and entitled "Equitable Sharing of North Slope Crude Oil" (A. 190) stated, in discussing "Short-Term Delivery Systems Proposals" (A. 193, 235), and specifically delivery by tankers:

> "Section 27 (the Jones Act) of the Merchant Marine Act of 1920 [46 U.S.C. § 883] requires that all marine trade between U.S. ports, whether coastwise or intercoastal, be strictly limited to U.S.-built and documented vessels owned by U.S. citizens. In addition to vessels engaged primarily or exclusively in this domestic trade, there are also U.S. flag vessels engaged in the U.S. foreign trade which satisfy the Jones Act requirements. Such foreign trade vessels clearly may be used in the domestic trade, unless they are *or have been* subsidized pursuant to the Merchant Marine Act of 1936.

> The 1936 Act established two types of direct subsidy program: one for the operation of U.S. flag vessels in the foreign trade, and one for the construction of U.S. flag vessels for use in that trade. While not prohibiting the use of vessels subsidized under either program in the domestic trade, the statutory provisions of these programs do place some limitations on the transfer of subsidized vessels to the domestic trade, involving mainly suspension or repayment of subsidy. *U.S. flag ships which receive such construction differential subsidies ('CDS') and operating differential subsidies ('ODS') may be used in marine trade between U.S. ports only (1) for six months in any year, (2) upon condition that they repay a pro-rated portion of the construction subsidy and forego the operating subsidy, and (3) if the Secretary of Commerce makes a finding that such action will further the purposes of the 1936 Act."* (A. 237-238) (emphasis supplied).[1]

[1]The study went on to indicate that inadequate tonnage in the eligible fleet was projected, and therefore the Maritime Administration of the Department of Commerce (hereafter, "the agency") intended to: "promulgate a proposed rulemaking to establish procedures for approving the transfer of CDS and ODS tankers to the domestic service, upon application. (Such promulgation may have occurred by the time this report is printed and distributed.)" (A. 238). The report stated that once these regulations were in effect, applications could be swiftly processed "and there need not, therefore, be any undue delays in obtaining authorizations for use of CDS and ODS tankers, if they are required" (A. 238). In fact, the regulations referred to were promulgated by the agency two months after the report was rendered, and provided that applications for use in the Alaskan oil trade of CDS-built vessels might be submitted to the agency. 46 C.F.R. Part 250. The regulations stated that no application would be approved "where the result would

Petitioner Seatrain Shipbuilding Corporation (hereafter, "Seatrain") says that in 1969 "when the projected international demand for tankers was rising and an imminent shortfall in tonnage was universally predicted," it commenced the construction of a series of Government subsidized supertankers intended for United States foreign commerce (Seatrain Brief, p. 7).[2] Seatrain says that by the time the STUYVESANT, built for foreign trade, was completed, in 1977, the foreign market had evaporated but the tanker market for Alaskan oil was good, whereupon an "attractive opportunity" presented itself to charter the STUYVESANT to carry Alaskan oil (Seatrain Brief, pp. 8-9). This recitation does not accurately describe Seatrain's intentions when it commenced building supertankers allegedly destined for U.S. foreign trade, or the state of industry knowledge at that time, or the "happenstance" of unanticipated opportunities in the Alaskan oil trade just as the STUYVESANT was nearing completion. The facts are that: (1) from the beginning, Seatrain was interested in the Alaskan oil trade; (2) it tried to "hedge" its "bet" on the foreign market by allowing for rededication of its supertankers, partially or fully, to the Alaskan oil trade if the market were to turn; (3) the Maritime Administration at

be to allow a vessel of the applicant to participate in the trade for a period exceeding six months in any consecutive 12-month period . . ." 46 C.F.R. § 250.5. *See infra,* pp 13 - 14.

[2]As hereafter used in this brief, statements such as "Seatrain says"or "Seatrain argues" will refer to assertions and arguments in the common brief submitted by Seatrain and its co-petitioner, Polk Tanker Corporation. References to "petitioners" will include Seatrain, Polk, and the Government, referring to the positions advanced by all parties seeking to overturn the decision of the court of appeals. References to "the Government" are directed to the brief submitted by the federal parties.

first rejected this plan and, indeed, predicted the turn of the market, considering a grant of CDS for Seatrain's supertankers inadvisable for that reason; but (4) the agency subsequently capitulated and granted CDS. Two internal memoranda of the Maritime Administration (A. 391, 404) reveal the real story.

The first memorandum, dated November 3, 1970, from the Deputy Maritime Administrator to the Deputy Undersecretary of Commerce on the subject of "SEATRAIN SHIPBUILDING CORPORATION (Seatrain) – Construction Differential Subsidy (CDS) for 230,000 DWT Tankers" shows that Seatrain applied, *in 1969,* for mortgage and loan insurance, but *not CDS,* for two very large tankers to be used *in the Alaskan oil trade* (A. 391). Approximately one year later, in 1970, Seatrain applied for CDS to build two additional very large oil tankers for operation in the U.S. foreign trades (A. 392). After the filing of those applications, the principals of Seatrain indicated that they instead wanted CDS on the first two tankers rather than the last two. (Id.) The report states why:

> "Apparently the reason for the 'switch' is the delay in the approval for the construction of the Trans-Alaska pipeline. Assuming the pipeline is built, most people feel that completion would not be before 1974-5 and that its capacity would not be reached until several years later. Hence, if the first two vessels were delivered on schedule in 1972 and 1973, there would be no profitable domestic employment for these vessels for at least several years. As a condition to the Title XI mortgage commitment Seatrain is required to

bareboat charter the ships for the first three years." A. 392.

The report considered in depth whether CDS should be granted for the building of these first two vessels for the foreign trade, and recommended that it should not. *First,* the report said that the amounts required would so cut into the agency's budget as to "seriously impair the Government's goal as mandated in the President's new Maritime Program in terms of the number of ships to be built...." (A. 394). *Second,* the report stated that the tankers were approximately twice as large as those considered most useful by the agency (A. 394-395). *Third,* the agency said that the vessels would have little national defense use because the Navy considered them "too deep, too wide, too long and too large" (A. 395). *Fourth,* the agency considered that Seatrain management and the Seatrain yard did not meet standards required for governmental assistance of this magnitude (A. 396-398).[3] *Fifth,* the report questioned whether the foreign tanker market

[3]In prophetic words, the agency in 1970 said: "In view of the apparent diminishing need for additional shipyards, there is a serious question as to whether Marad should, through the payment of $40 or more million [sic] in CDS, contribute to the start-up and renovation of an unproven shipyard which, at least to date, is committed to building ships for its parent to the exclusion of others, or support going facilities of proven worth. (A. 396) * * * Probably the most impelling consideration for Government assistance is the promise that jobs will be created for a large number of the hardcore unemployed and disadvantaged in the area adjacent to the shipyard. The degree to which this will eventually work out can only be conjectured. However, if the yard eventually fails to survive after we spend $40,000,000 in CDS funds, the net result can only be that these people will have some limited and specialized training and temporary employment. These people will not find ready employment in the New York area because the ship repair business is limited in size and their training will not make them readily eligible for the highly unionized building trades. On the other hand, if the $40,000,000 is spent in a shipyard with a high probability of survival, the investment in training will have a more permanent effect. Since almost all shipyards are near depressed areas the benefiting shipyards will also be training the disadvantaged." (A.397-398).

The New York Times of May 9, 1979, at A1. col.2, reported the closing of the Seatrain shipyard.

would support these two vessels scheduled for delivery in 1972-1973 (A. 399). *Sixth,* the report questioned whether the ships could be profitable (A. 400-401). *Seventh,* the report considered whether the ships, if not profitable for foreign trade, could be deployed in the domestic trade and answered that question negatively in these words:

> "In accordance with Section 506 of the Act, Marad may consent to the transfer of a vessel built with CDS to other trades (domestic) for periods not exceeding six months in any year with the partial repayment of subsidy. *Therefore, the vessels could not operate exclusively in the domestic trade even with repayment of subsidy.*
>
> There is a possibility that if Seatrain sold the vessels and repaid subsidy, the ships could operate in the domestic trade under the new owners. Such was the case with the Grace-Sealand containerships, however, said case was an unforeseen necessity *and not pre-arranged to circumvent the basic policies of the Act.*" (A. 401) (emphasis supplied).

The second memorandum was an interagency report from the Chief, Office of Subsidy Administration to the Maritime Administrator, undated but subsequent to November 3, 1970 (A. 403). The memorandum is a commentary on the Seatrain application for CDS for the building of the first two of the projected four tankers, and as such, recites and considers the arguments advanced by Seatrain in support of its application. The memorandum

reveals that Seatrain tried to persuade the agency that the venture was profitable because the vessels could be diverted to the Alaskan trade, either for six months of each year, every year, or permanently and exclusively upon repayment of unamortized subsidy. The memorandum reflects disagreement with both of these Seatrain suggestions for such alternative use of vessels purportedly to be built with CDS for the foreign trade. Thus with respect to the idea that the vessels would serve in the Alaskan oil trade six months of each successive calendar year, the memorandum says: "We are opposed to the return of any vessel built with CDS to the domestic trade that is capable of the carriage of liquid bulk cargoes primarily for two reasons – namely (1) it is inconsistent with the basic policies of the Act, and (2) it presents unfair competition to existing and proposed domestic vessels built and operated without government subsidies." (A. 412-413). With respect to Seatrain's suggestion that "the tankers could be operated without restriction in the domestic trades upon repayment of the full unamortized portion of the CDS" (A. 414), the memorandum said:

> "Neither section 506 nor any other provision of the Act relating to the CDS provides for releasing a CDS built ship from the domestic trade restrictions imposed by section 506 upon repayment of unamortized CDS." (A. 414).[4]

Despite these initial memoranda strongly recommending against the granting of CDS for even the first two of the projected four Seatrain supertankers, CDS was actually given for all *four* of the tankers, presumably for use in

[4]The memorandum then discussed the one instance in which the agency did release domestic trade restrictions, see *infra*, pp. 101-103, and concluded that such a release for Seatrain, if permissible, would not be warranted (A. 414-415).

foreign commerce, since the Act allows an application for CDS to be filed only "to aid in the construction of a new vessel to be used in the foreign commerce of the United States." Merchant Marine Act, section 501(a), 46 U.S.C. § 1151(a).[5] The reasons for the agency change of position in granting Seatrain CDS for four supertankers, when it had initially recommended against CDS even for two, are not set forth in the record.

The STUYVESANT was the third vessel of this series.[6] The contract for the building of the STUYVESANT was entered into on June 30, 1972 with a CDS award of $27.2 million and a government guarantee of the construction loan in the maximum amount of $30.2 million (A. 418). At the time of the award, in 1972, the vessel had no commitment for any employment.[7] Construction of the STUYVESANT was halted in 1975 because a severe downturn in the demand for crude oil tankers in foreign trade made prospects of employment for this vessel, built on speculation, even more problematical than they were when the subsidy contract was awarded (A. 112). The halting of construction of the STUYVESANT – and of the last ship in the series, the BAY RIDGE – resulted in the virtual closing of the Seatrain yard. The Economic Development Administration (a sister agency of the Maritime Administration in the Department of Com-

[5]Indeed, Seatrain's affidavits to the courts below speak only of an intention "to enter the shipbuilding business at a time when the projected *international* demand for crude carriers was steadily rising. . . ," giving no hint that it had initially supported the economic viability of its proposal for CDS on the grounds of later diversion to the Alaskan oil trade (A. 111) (emphasis supplied).

[6]The first two vessels, the BROOKLYN and the WILLIAMSBURG, were long-term chartered in the U.S. foreign trade to American Petrofina, Inc. (A. 112).

[7]Pet. App. 9a.

merce) then determined to guarantee 90 percent of another $40 million loan to Seatrain from private investors to reopen the yard (A. 113).[8] Construction of the STUYVESANT then recommenced even though foreign trade prospects were still bleak. The vessel was completed in 1977 (A. 113).

Between 1970, when it first recommended against CDS assistance for any of the Seatrain supertankers – a recommendation based in large part on the commercial nonviability of the project, see *supra,* pp.8-10 – and 1977, when the STUYVESANT was completed, the agency also reversed field on its 1970 decision not to grant loan guarantees under Title XI of the Merchant Marine Act. That title permits the agency to guarantee loans of up to 75 percent of the cost of a CDS-built vessel upon a finding "that the property or project with respect to which the obligation will be executed will be, in [the Secretary's] opinion, economically sound. . . ." Merchant Marine Act, section 1104(d), 46 U.S.C. § 1274(d). This finding is required to be made both "prior to the time such commitment [to guarantee an obligation] is made," and "at or prior to the time the guarantee becomes effective. . . ." *Id.* In 1972 the agency had committed itself for $30.2 million in loan guarantees for the STUYVESANT (A. 418).

When the STUYVESANT was completed in 1977, prospects for its use in foreign trade had not improved from the time that construction was recommenced in 1975.[9] In 1977, however, Seatrain had already received:

[8]The Government (Government Brief, p. 7 n. 11) gives 42 U.S.C. § 1342 as the source of EDA aid to Seatrain. That section requires a determination of "reasonable assurance of repayment" and the implementing regulations require the submission of detailed information so that the necessary determination may be made. 13 C.F.R. § 306.9.

[9]Seatrain Brief, pp. 8-9.

(1) $27.2 million CDS for the STUYVESANT;
(2) $28.8 million CDS for the fourth tanker in the series, the BAY RIDGE;
(3) a $30.2 million guarantee of a construction loan for the STUYVESANT;
(4) a $34.5 million guarantee of a construction loan for the BAY RIDGE;
(5) a $5 million loan by the EDA; and
(6) a $73.8 million EDA guarantee of private loans for both vessels.[10]

Government commitments thus had escalated substantially despite the agency's original analysis concluding that the purposes and policies of the Act (and, indeed, the policies for providing assistance under the Economic Development Administration, *see supra,* p. 12 n. 8, and A.397-398) would not be served by huge governmental aids for the Seatrain ventures. Thereupon came the first public signal that this CDS-built vessel (and presumably its sister ship, the BAY RIDGE) was to be used in domestic commerce in the Alaskan oil trade, and for periods exceeding six months in any year.

On July 8, 1977, petitioner Polk Tanker Corporation (hereafter, "Polk") filed with the agency an application for a "three-year waiver" of the restrictions imposed by section 506 of the Merchant Marine Act, 1936, so that it could time-charter the STUYVESANT to Sohio for three years to carry oil from Alaska to the continental United States (Pet. App. 10a).[11] The application was received as a filing under 46 C.F.R. Part 250 – the regulations promulgated in June, 1977, presumably to implement the program referred to in the Federal Energy Administration

[10]Pet. App. 8a-9a and A. 418.

[11]Seatrain's affiant said that "serious" negotiations for this charter had commenced in December, 1976 (A. 113).

report on transport of Alaskan oil (*supra,* pp. 4-5 & n. 1) — regulations which allowed six-month use of CDS vessels in the Alaskan oil trade as a short-term supplement to the Jones Act fleet. The application was accompanied by a Seatrain memorandum arguing that a three-year waiver of the section 506 restrictions was permitted under section 207 of the Act (A. 18-33). Although the agency's regulations stated that applications for periods longer than six months would not be approved (46 C.F.R. § 250.5), the agency assigned the application a docket number, S-565, and published notice of its filing in the *Federal Register* on July 19, 1977 (42 Fed. Reg. 37229 (1977)) (Pet. App. 70a). There followed the submission of voluminous comments in opposition, by respondents and others, all directing the agency's attention to its lack of authority under section 506 to grant the waiver, and challenging the Seatrain rationale that section 207 of the Act provided the agency with sufficient authority to make the contemplated inroad upon the restrictions mandated by section 506 (Pet. App. 10a-11a).

While the application for a "three-year waiver" was pending, the agency held several *ex parte* meetings with petitioners (Pet. App. 11a) and eventually accepted a proposal submitted by Polk that the agency release the restrictions of the subsidy contract under which the STUYVESANT was constructed, thereby permitting operation of the vessel in the otherwise prohibited domestic trades, upon Polk's execution of a 20-year promissory note (payable in 40 semiannual installments) for the amount of $27.2 million CDS (*Id.*). The agency did not notice this new proposal in the *Federal Register,* but instead confirmed its approval of Polk's proposal by two letters to Polk, both dated August 31, 1977 (*Id.*). One of the letters and a press release subsequently issued by the agency stated that approval of the Polk proposal was given because the continued operation of Seatrain was in jeopardy, which in turn meant that it might default on its obligations to the various agencies of the Department of Commerce (A. 34).

The financial transactions contemplated by the approvals of August 31 were the issuance of $60.2 million of government-guaranteed indebtedness on the STUYVESANT, of which $31.3 million would be indebtedness incurred through the sale of bonds; $28 million of that $31.3 million would be used to repay part of the outstanding loans guaranteed by the Economic Development Administration (Pet. App. 71a).[12] Seatrain's "repayment" of the $27.2 million CDS was to be by promissory note payable over 20 years in equal semiannual installments, the security for which was a *third* mortgage on the STUYVESANT which was to be subject to two prior mortgages issued as security for the $60.2 million of government-guaranteed indebtedness on the loan (A. 68, 72).

On September 22, 1977, respondents ABC and Trinidad and respondent Shell Oil Company (hereafter, "Shell") filed a complaint seeking district court review of the agency's actions and moved for temporary and preliminary injunctive relief, principally on the grounds that section 506 of the Act barred the permanent operation of a CDS-built vessel in the domestic trade. Affidavits submitted in support of this complaint showed the total disruption to the market that occurs because of the agency's actions lifting

[12]To commit itself to the new guarantees, the agency issued a finding, required under section 1104(d) of the Act, "that the property or project with respect to which the additional guaranteed obligations would be issued remains, in the [agency's opinion], economically sound" (A. 40), despite the fact that the only employment for this vessel referred to in these approvals was the three-year charter to Sohio (A. 35).

the section 506 bar. The complaint and the affidavits explored in detail the consequence of these actions; the instant devaluation of 29 vessels suitable for the Alaskan trade which were built without subsidy (A. 89-90); the possible entry of approximately 5,000,000 aggregate deadweight tonnage represented by CDS-built tankers which might similarly be waived into the Jones Act tanker fleet which had an aggregate deadweight tonnage of 9,500,000 (A. 84, A. 89-91); the difficulties which ABC and Trinidad would have in securing employment for their existing tankers beyond short-term charters due to expire in 1979-1981 (A. 84, A. 91); and the competitive injury to these companies of permitting vessels built with CDS for the foreign trade to come into the domestic trade several years after construction, during a period of rising construction costs. (A. 92-93).[13] The complaints and affidavits spoke of the "adverse financial impact on the assets and operations of [plaintiffs'] and other companies similarly situated" (A. 85) and the inevitable inhibition on investment in unsubsidized tonnage for the domestic fleet (A. 91-93). A temporary restraining order was issued on September 22, 1977; preliminary injunctive relief was denied on September 30, 1977, principally on the ground that plaintiffs had failed to show immediate irreparable injury (Pet. App. 12a). Following the denial of the motion for preliminary injunction, the transactions involving the STUYVESANT were "closed" (*Id.*).[14]

[13]In the four years between July, 1973 and July, 1977, shipbuilding labor costs rose 40 percent and material costs 58 percent. A subsidized ship built in 1973 would be available at a base cost 50 percent below that of an unsubsidized ship built four years later, *over and above differences in costs reflected by the amount of subsidy* (A. 88).

[14]In denying the preliminary injunction, the district court judge issued the following caveat:

> "These business entities that are not now before the Court, who, allegedly, and according to the representations of counsel, are going to close on a very substantial and multimillion-dollar transaction today, may find out later, upon further consideration of the law and the merits, that such transaction was not proper, was illegal, or arbitrary and capricious; and, thus, they may have certain problems." Record of the district court, as certified to the court of appeals for the appellate review docketed as No. 78-1281 (R. 57 p. 10).

Discovery proceeded on an expedited schedule and the parties filed cross-motions for summary judgment (Pet. App. 12a). On November 22, 1977 the trial court issued an opinion (Pet. App. 65a-95a) and order (A. 556-557) which (1) granted the motions of ABC, Trinidad, and Shell for summary judgment on the issue of whether the waiver for the STUYVESANT had been granted without any consideration of the competitive effects thereof, and was therefore in violation of the Administrative Procedure Act,[15] remanding the case to the agency for such consideration; (2) denied the motions of ABC, Trinidad, and Shell for summary judgment and injunctive relief on the issue of whether section 506 of the Act barred the agency from ever lifting the bar against permanent operations by any CDS-built vessel in the domestic trades, and granted the agency's and petitioners' motions for summary judgment on that issue; and (3) denied the agency's and petitioners' motions for summary judgment on another claim of procedural irregularity and retained that issue for disposition by the court (Pet. App. 94a-95a). By further order entered on November 30, 1977, the trial court dismissed the remaining pending claim[16] and entered final

[15]The trial court held that the protection of unsubsidized vessels from unfair competition by subsidized vessels was "one of the cornerstones of the statutory scheme" (Pet. App. 92a).

[16]The trial court found that the additional claim "that the Secretary's decisions with respect to the STUYVESANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977 . . ." was "superfluous and would afford plaintiffs no greater relief than the remand which has already been ordered by this Court. . . ." (A. 558)

judgment with respect to all claims decided by the court (A. 558-559).

Appeals from the trial court's decision were filed in the United States Court of Appeals for the District of Columbia Circuit, and the court of appeals rendered its decision on February 6, 1979 (Pet. App.2a). The court of appeals reversed the trial court's decision, holding that the agency's actions were barred by section 506 of the Merchant Marine Act, 1936. (Pet. App. 51a). A dissenting opinion, filed by Judge Bazelon, would have sustained the judgment of the trial court (Pet. App. 60a-61a). Seatrain and the agency petitioned for rehearing with a suggestion for rehearing *en banc;* these petitions were denied, the latter by the full court,[17] with Judge Bazelon noted as in favor of granting both petitions (Pet. App. 62a-64a).

On March 20, 1979, Seatrain and the agency filed with the court of appeals a petition for a stay of the mandate pending appliation to this Court for a writ of certiorari. That motion was granted on April 19, 1979 but the stay was ordered only until May 1, 1979. The petition herein having been filed on April 30, 1979, the stay is still in effect, and the STUYVESANT continues to operate in the domestic trade, as it has since October, 1977.

SUMMARY OF ARGUMENT

The court of appeals held that section 506 of the Merchant Marine Act, 1936, prohibits the entry of a vessel built for United States foreign commerce with the aid of construction-differential subsidy into domestic commerce

[17]The original order denying the suggestion for rehearing *en banc* filed March 22, 1979, shows consideration by the entire court, with only Judge Bazelon recorded as in favor of a rehearing *en banc* (Pet. App. 63a-64a). An amendment to that order was filed showing that Judge Levanthal did not participate in the decision on the suggestion for rehearing *en banc* (A. 602).

for periods longer than six months in any year. Consequently, the court of appeals reversed a district court order which had denied plaintiffs' request for declaratory and injunctive relief against the waiver by the Secretary of Commerce of the section 506 bar, and dismissed the case. The court of appeals had jurisdiction to review that order and its decision was correct.

I

A. The order appealed from was reviewable under Rule 54(b) of the Federal Rules of Civil Procedure because it finally disposed of one or more but less than all of the claims for relief. The remand ordered by the district court, pertaining only to the "competitive effect" of the STUYVESANT upon respondents and others, did not detract from the finality of the decision rendered, because the complaint sought more than the barring of the STUYVESANT from the Alaskan oil trade. No proceedings on remand could have affected the judgment of the district court which finally decided, adversely to plaintiffs ABC and Trinidad, that they were not entitled to two of the four prayers for relief requested in the complaint. The Government construction of the complaint as requesting an injunction going only to the exercise of the claimed power with respect to the STUYVESANT is not supportable, and the Government contention that an order may not be entered under Rule 54(b) where the issues decided and those remaining are factually interrelated has been decided adversely to the Government by this Court in *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956).

B. Even if the complaint had sought only an injunction against the operation of the STUYVESANT, the order appealed from would be final under 28 U.S.C. §1291 because plaintiffs might otherwise be barred from obtaining appellate review of the principal issue of agency authority

which was decided in the order encompassing the remand. If, for example, the decision on remand, or a subsequent district court review of that decision, ultimately determined that the STUYVESANT should be barred because of "competitive effect," the Secretarial power to waive the statutory bar could be exercised at a later time for that vessel (or others) under the unreviewed order of the district court. Moreover, even if the remand proceeding culminated in a decision sustaining Secretarial exercise of the waiver power, thus providing an opportunity for eventual appellate review, the issue of agency authority would not be encompassed within such review. All of the facts and arguments relating to that issue were contained in the case which stood dismissed by the November 30, 1977 order. A review of the Secretary's decision on remand would not relate to the issue of Secretarial authority, and the record on review of that new decision would be barren of all of the facts and arguments relating to the existence of the disputed waiver authority. The order was therefore final, within the meaning of 28 U.S.C. §1291, even if, *arguendo,* the complaint had only one claim for relief.

C. Even if the order appealed from was not final under Rule 54(b) or 28 U.S.C. §1291, it was properly appealable under 28 U.S.C. § 1292(a)(1) as a final order denying injunctive relief. 28 U.S.C. §1292(a)(1) has been uniformly interpreted as conferring jurisdiction upon courts of appeals to consider appeals from denials of requests for permanent, as well as preliminary, injunctions. The Government contention that no injunction was finally denied because of the possibility of a Secretarial decision on remand barring the STUYVESANT again misreads the complaint as seeking an injunction barring only that vessel, rather than an injunction against any exercise of the disputed waiver authority.

II

The Merchant Marine Act, 1936, authorizes the agency to award construction-differential subsidy (CDS) in order to equalize the costs of building vessels in U.S. shipyards with the lower foreign costs of construction. CDS is available only for vessels intended to serve U.S. foreign commerce, and such vessels may, in the course of such foreign service, carry cargoes between four enumerated U.S. trades, referred to herein as incidental domestic trades. No CDS is allowed for building vessels intended for purely domestic commerce for the reason that only U.S.-built vessels can carry cargo in those trades under the Jones Act, 46 U.S.C. §883. Vessels built for Jones Act trades charge higher freight rates than vessels built for foreign trades because of higher construction (and operating) costs in U.S. domestic commerce compared to U.S. foreign commerce, and the Jones Act fleet consequently is not competitive with the subsidized fleet. The Merchant Marine Act protects the Jones Act fleet from competition with vessels built with subsidy by a specific provision, section 506 of the Act, mandating that every owner of a vessel built with subsidy must use the vessel in foreign or incidental domestic trades with one exception: such vessels may serve Jones Act trades upon receiving the agency's consent, but such consent is limited to six months in any year. There is no provision in the Merchant Marine Acts which permits the building of vessels with CDS with the option, at any later time, of redeploying the vessel in Jones Act trades upon a commitment to pay back all or any portion of that subsidy.

Section 506 addresses the entire universe of the permissible uses for CDS-built vessels and also sets forth the exceptions for such uses. When a statute sets forth the exceptions to a prohibition, other exceptions may not be implied. The statute is so plain and unambiguous on its face

that there is no need to alter the plain meaning of the language by resort to "aids of statutory construction" which are used to determine the intent of Congress when a statute is ambiguous. Petitioners' entire argument rests not upon the language of the statute, but on an attempt to vary the plain language by resort to those aids.

Nonetheless, examination of relevant legislative history conclusively confirms the interpretation of the statute that is conveyed by its language. While the statute, as originally enacted in 1936, might have permitted the action taken by the agency here, it was amended in 1938 to delete the only language which could conceivably have permitted a permanent waiver of the bar against entry of subsidized vessels into the domestic trades upon repayment of subsidy. The legislative history clearly shows that the deletion was purposeful, and was done at the request of the agency which thought that the only permissible incursion by subsized vessels into Jones Act trades ought to be one entry limited to six months in any year. Petitioners reliance on debates in, and proposed but unenacted legislation of, later Congresses to show a contrary interpretation of the 1938 amendment is legally infirm, *International Bhd. of Teamsters* v. *U.S.*, 431 U.S. 324 (1977); moreover, the legislative materials cited do not even support petitioners' point. On the other hand, statutes actually enacted by later Congresses show a congressional recognition that the section 506 bar can be lifted only by congressional, not administrative, action.

No other sections of the Act empower the Secretary to waive the bar imposed by section 506. Section 207, cited by petitioners as the source for this authority, confers corporate, not governmental powers; and section 504, also cited by petitioners, mandates respect for the bar imposed by section 506.

No deference to the views of the agency in interpreting its statute is required in this case. Assuming, *arguendo,* the statute were ambiguous or could be made ambiguous by resort to the legislative history cited by petitioners, the agency has met none of the threshold requirements for receiving judicial deference to its views. The agency's interpretation of the statute was not invoked at the time of taking the actions here complained of; it was not articulated, much less well-reasoned. The first time the agency ever interpreted the statute to confer administrative power to waive the section 506 bar was 26 years after its enactment, in a matter not judicially tested (the Grace Line action). This is only the second time that interpretation has ever been triggered. Moreover, the statutory interpretation given the first time was repudiated here: for the Grace Line vessels, the agency said the waiver authority was conferred by section 506, whereas here, it urges that section 506 is neutral on the question.

Although there is no consistent interpretation of the statute supporting the actions here taken, there is much inconsistent agency interpretation. Regulations of the agency specifically issued to remedy any temporary imbalance in the Alaskan oil trade limit the entry of CDS-built vessels into that trade to six months. The agency has contracted with its subsidy recipients to bar any subsequent owner of a CDS-built vessel from serving domestic trades other than in compliance with section 506. The agency, internally, has in the past rejected suggestions that the section 506 bar may be waived upon repayment of unamortized subsidy.

The statutory interpretation urged here by the agency is a *post hoc* rationalization to protect the government from the consequences of having guaranteed loans to private ventures which are now in trouble, and this was the precise reason given for the waiver when the actions complained of were taken. A proper balancing of the roles of the legislative and executive branches does not require judicial deference to agency interpretations in such circumstances.

III

Even if, *arguendo,* section 506 did not bar the permanent entry of vessels built with CDS into the domestic trades, the actions taken by the agency were unlawful because the acceptance of a promissory note, payable over 20 years as "repayment" of the subsidy, was an unauthorized loan from the Government to a private party. The only loan authority of the agency is found in section 509 of the Act which was not applicable, by its terms, to acceptance of the repayment of subsidy for vessels built for foreign trades. In the one other instance, the Grace Line action, in which the agency waived the section 506 bar, the agency expressly disclaimed the power to accept repayment over time. Under petitioners' own theory that a vessel which continues to enjoy the benefits of subsidy may not ply the Jones Act trades, the loan arrangement was unlawful. In any event, it was unlawful as an unauthorized payment from the United States treasury. *Reeside* v. *Walker,* 11 How. 272 (1851); *United States* v. *MacCollom,* 426 U.S. 317 (1976).

IV

The broad purposes and policies of the Merchant Marine Acts are to foster the development of a U.S. Merchant Marine capable of carrying United States commerce and serving the nation's needs in times of war or national emergency. Achievement of those objectives requires certainty about the Government's role in respect of all the components of the industry. The investments required are large; markets are volatile; economic forces are unpredictable. If the Merchant Marine Act, 1936, is now interpreted to permit the "waiver" of vessels built with subsidy into the domestic trades, the basis upon which huge sums from private enterprise have been invested to build vessels for domestic trades will be destroyed.

Decisions to invest in vessel construction require as much certainty as possible about future prospects, particularly given the long lead time required for construction. Such decisions have been made, in the past, upon the understanding that vessels built or to be built with subsidy are ineligible for permanent operation in domestic trades. Given the necessary lead years of construction and the volatility of the business market, the entry upon "waiver" of huge subsidized tonnage built in less inflationary times would severely inhibit the growth and development of the Jones Act fleet. The fundamental purposes of the Merchant Marine Acts would be sabotaged.

Adoption of petitioners' theories ineluctably leads to a melding of the Jones Act and subsidized fleets. If the only condition for permanent entry into Jones Act trades is the repayment of unamortized subsidy, all of the subsidized tonnage becomes waivable into Jones Act trades depending upon the Secretary's perceived need to protect government loan guarantees of vessels, guarantees which extend over the vessels' economic lives. If, as claimed, section 506 is neutral on the issue of whether vessels may be rededicated to the domestic trades provided only that "unamortized" subsidy is repaid, ships might go back and forth from Jones Act to subsidized fleets as markets change. The statutory bar against entry into domestic trades for periods not exceeding six months is not reconcilable with the broad discretion theory urged here by petitioners.

The issue of proper demarcation between the Jones Act and subsidized fleets is one that has been addressed by the Congress. If the boundaries are unwisely marked by section 506, the statute should be amended. Congress, not the executive, should legislate in this area, particularly where the impartiality of the executive branch is imperiled by the consequences of having committed itself to an imprudent

business venture. Only the Congress can fairly evaluate the needs of the Jones Act fleet and the subsidized fleet for protection and encouragement.

Petitioners' suggestions that the result they seek is needed to promote competition or prohibit monopoly, or to serve the national energy needs, ring false and hollow. There is no evidence for the proposition that respondents have monopolized the Alaskan trade. Fair competition is not enhanced by allowing some tanker operators in the Alaskan trade to have received Government aid unavailable to others. There is no way in which the competitive position of respondents can be equalized with that of Seatrain, where Seatrain received Government monies not available to respondents, and, moreover, has 20 years to repay those monies. The record does not support petitioners' rationalization that the agency actions are needed for reasons pertaining to national energy needs, and the actions were not taken for that purpose.

Construction-differential subsidy is designed to promote United States foreign commerce. Neither the objective of promoting the purposes of the Merchant Marine Act nor the goal of preserving the proper balance between the legislative and executive branches is furthered by permitting the agency to accomplish what Congress has refused to permit: the permanent dedication of vessels built with CDS to the domestic trades. Petitioners' predicament should not obscure these vastly more important long-range objectives.

ARGUMENT

1. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DECISION AND ORDER OF THE DISTRICT COURT.

A. The Order Appealed From Was Final And Appealable Under Rule 54(b) Of The Federal Rules of Civil Procedure.

The Government contends that the district court's November 30, 1977 entry of judgment, which it admits was intended to be a final judgment on one or more but less than all of the claims presented pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,[18] was improperly entered and the court of appeals therefore lacked jurisdiction over the subsequent appeals. Citing this Court's recent decisions in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) and *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976), the Government argues that such certification undermined the well-established policy against piecemeal appeals, because the remand ordered by the District Court would provide plaintiffs either (a) full relief, by prevailing in the remand proceeding, or (b) subsequent full judicial review, by appeal of a remand decision unfavorable to plaintiffs.

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[18]The District Court made the specific findings required by Rule 54(b), namely that "no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977 . . . FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977" (A. 558-559), thus signaling that the order was appealable under Rule 54(b). Plaintiffs were put on notice that it was time to take an appeal. C. WRIGHT, Law of Federal Courts, §101 at 506 (3d ed. 1976).

That the Government's entire argument on finality is based upon the contention that plaintiffs' complaint sought a bar *only* for the STUYVESANT is clear: "Plaintiffs' complaint asserted only one claim or cause of action arising out of one set of facts: that the Secretary could not lawfully permit the STUYVESANT to sail in the Alaskan trade for more than six months per year." (Government Brief, p. 41).[19] From this premise, the Government construes plaintiffs' complaints as proferring two alternative legal theories upon which to find a prohibition of permanent domestic trading for the STUYVESANT: (1) the Secretary had no power to waive the section 506 bar; and (2) the Secretary should not have waived the section 506 bar because of the STUYVESANT's competitive effect on plaintiff (Government Brief, pp. 41-42). Reasoning that the second theory was preserved by the remand, the Government concludes that there was no final disposition of any claim by the District Court order of November 30, 1977 (Government Brief, pp. 42-43).

The critical flaw in this argument is that this is not the complaint which was filed. ABC and Trinidad did not seek *only* an injunction against the permanent operation of the STUYVESANT in the domestic trades; rather ABC and

[19]The theme that an injunction against the STUYVESANT was *all* that plaintiffs sought is repeated throughout the Government's argument, *e.g.*, "Rather, if they [the plaintiffs] could have convinced the Secretary on remand that the STUYVESANT transaction was improper because of its economic effects or, failing that, could have demonstrated to the district court on review of the decision on remand that the Secretary had abused her discretion or had acted arbitrarily, plaintiffs would have had no cause to complain, and no reason to appeal to the court of appeals." (Government Brief, p. 28). "If, on the other hand, the Secretary on remand had concluded that it was inappropriate to allow the STUYVESANT to operate in the Alaskan trade, there would have been no need for plaintiffs to appeal at all." (Goverment Brief, p. 36).

Trinidad sought a declaratory order that the agency lacked the statutory power to waive the bar against permanent operation of *any and all* vessels built with CDS in the domestic trades, and an injunction against *any* agency exercise of that claimed power. Admittedly, if plaintiffs had prevailed on this broad claim, the agency's actions with respect to the STUYVESANT would have been judicially invalidated. On the other hand, an injunction going only to the *exercise* of that power in respect of the STUYVESANT would not have afforded plaintiffs all of the relief sought. The only relief that plaintiffs could have enjoyed from the remand ordered by the district court would be an invalidation of the agency's waiver of the bar for the STUYVESANT.[20]

In no way did ABC and Trinidad complain only of the actions taken with respect to the STUYVESANT. The complaint alleged that the agency was intending to make "similar arrangements" to lift restrictions on the BAY RIDGE (¶ 33, A. 57), a sister ship to the STUYVESANT and under construction; the complaint alleged that lifting of the bar for *any* vessel built with CDS so as to allow permanent operation in the domestic trades was unlawful and defeated the purposes of the statute (¶ 42, A. 61-62); and the complaint alleged that ABC and Trinidad, shipowners who had paid the full cost of U.S.-built tankers and had not received federal subsidy, would be subject to the unfair and unlawful competition from the STUYVESANT

[20]The district court's decision ordered the agency to consider only the competitive effects upon plaintiffs of the exercise of that authority in respect of the waiver for the STUYVESANT because the district court held that the agency's failure to consider and weigh such effects violated the Administrative Procedure Act (Pet. App. 93a-94a). The issue of the Secretary's authority, however, was judicially settled, and could not have been reargued before the agency in the remand proceeding.

"and from other CDS-built vessels with respect to which vessels the agency may likewise lift operating restrictions if this action is permitted to stand." (¶ 41, A. 61). The same paragraph and the ensuing paragraph of the complaint speak of the unfairness to plaintiffs, who had made the economic decision to invest in ships built in U.S. shipyards without subsidy, relying on supply and demand of the domestic market, being subject to unforeseen and immeasurable competition from vessels now in operation having been built with subsidy, and to the disruption of the market, both in respect of meeting financial commitments previously undertaken and in planning for additional investment, because of the new agency position that it possessed the power permanently to waive the bar. (A. 61-62, and see *supra,* pp. 3-4). *Two* of the four requests for relief requested a declaratory judgment and an injunction against lifting the statutory bar against permanent operation in the domestic trades for any or all vessels built with CDS, and were in no way limited to seeking a determination that only the STUYVESANT was so barred (A. 62-63).[21] *The affidavits submitted on behalf of ABC and Trinidad complained not only of the effect on these plaintiffs of lifting the bar for the STUYVESANT, but also and more especially of the effect on plaintiffs of the*

[21]There were four counts in the ABC/Trinidad prayer for relief. The first asked for a permanent injunction against the agency from taking steps to carry out its actions releasing the STUYVESANT from the statutory bar; the second asked for a declaratory order that the agency lacks authority to waive the restrictions of section 506 "so as to permit the operation of vessels built with construction differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year);" the third asked for a permanent injunction against the agency from amending *any* CDS contracts or taking other actions permitting such operations for any CDS-built vessels; and the fourth asked for such other relief as the Court may deem appropriate. (A. 62-63).

agency position, made explicit by its actions in respect of the STUYVESANT, that it possessed the disputed authority which might be exercised at any time, thus undermining both plaintiff's present and planned commitments to the Alaskan oil trade (A. 83-84 & A. 87-91).[22]

The Government's failure to understand or recognize that the complaint sought not only the barring of the STUYVESANT, but also a declaratory judgment and injunction against the lifting of the bar for any CDS-built vessel, undermines its entire argument as to lack of finality. Almost all of the cases cited by the Government discuss the finality issue in a context wherein there was no Rule 54(b) issue or certification, *e.g., Boston & Maine Railroad* v. *United States,* 358 U.S. 68 (1958), and cases cited at pp. 26 and 29 of the Government Brief, and throughout the Government's discussion of 28 U.S.C. 1291. The only Rule 54(b) cases cited by the Government are (1) those in the *Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427 (1956) line, holding district court determinations of eligibility for Rule 54(b) treatment not binding on appellate courts, and (2) *Liberty Mutual Insurance Company* v. *Wetzel, supra,* 424 U.S. 737. The *Sears* principal is not disputed here; we concede that the district court had to be correct that one of less than all claims was finally decided by the order of November 30; we argue that a reading of the complaint leads to no other conclusion.

Liberty Mutual is not apposite. While *Liberty Mutual* did consider the application of Rule 54(b), it did so in a context wherein the merits of the action had been decided

[22]Indeed, the disruption to the market and the unforseen consequences of the claimed existence of this agency power were relied on by the court of appeals in holding that Congress did not intend the agency to have the authority claimed (Pet. App. 49a-51a).

in plaintiff's favor, but the district court had not yet determined whether to grant *any* of the relief requested by plaintiffs at the time it purported to issue a Rule 54(b) order. The plaintiffs had sought injunctive relief, damages, costs, and attorneys' fees for violations of Title VII of the Civil Rights Act of 1964. The district court had found in plaintiff's favor on the issue of violation, and had purported to issue a Rule 54(b) order on that issue, but had determined to withhold relief pending further proceedings. Holding that such an order "finally disposed of none of the respondents' prayers for relief" (424 U.S. at 742), this Court held that the order was not a final order under Rule 54(b). In this case, the November 30, 1977 order finally disposed of two specific prayers for relief.

The only other point made in the Government's short discussion of Rule 54(b) is that the case is not appealable as an interlocutory order under 28 U.S.C. § 1292(b), again citing *Liberty Mutual,* because the judge failed to state the three required findings. But reviewability is not predicated here on 1292(b); this Court considered that section in *Liberty Mutual* as an alternative ground for jurisdiction only after it had determined that *no* claim for relief was finally decided by the order from which appeal was taken. 424 U.S. at 744-745.

Indeed, the only arguments relevant to the issue of finality when the complaint is read for what it says is the Government's footnote suggestion (Government Brief, p. 31 n. 31), that a request for "relief against future STUYVESANT-type transactions would not have been justiciable under Article III of the Constitution." But while the "case or controversy" requirement of Article III limits the jurisdiction of federal courts to disputes of a definite and concrete nature, *Aetna Life Ins. Co.* v.

Haworth, 300 U.S. 227, 240-241 (1937),[23] application of that requirement does not preclude resolution of a dispute concerning the powers of an administrative agency where, as here, that resolution has a pervasive impact upon plaintiffs and the issue is tendered in a concrete posture.

In the landmark case of *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), this Court held that before accepting jurisdiction under the Declaratory Judgments Act, 28 U.S. § 2201-2202, a court must be satisfied that the issues tendered are fit for judicial decision and that withholding such decision would work a hardship upon the parties. 387 U.S. at 149. In *Abbott Laboratories,* as here, "the issue tendered is purely a legal one: whether the statute was properly construed by the [agency] . . ." *Id.* Noting that the agency interpretation of its powers was neither "informal," nor "tentative," nor an expression by a subordinate official, this Court in *Abbott Laboratories* found no constitutional bar to a judicial determination of the limits of agency powers.

Not only is this case identical with *Abbott Laboratories* in that the issue tendered for judicial resolution is the

[23]Mr. Chief Justice Hughes' explanation of the "case or controversy" requirement in *Haworth* remains the classic definition:

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised. . ." 300 U.S. at 240-241 (citations omitted).

scope of a congressional delegation of power, but here, unlike *Abbott Laboratories,* that power has actually been exercised. To suggest, as does the Government, that one may tender for judicial resolution the existence of agency power only after the particular exercise of that power has been judicially sustained is to betray an ivory-tower understanding of the manner in which builders and charterers of supertankers make their business commitments. The courts have not relegated businesses subject to the pervasive impact of government aid and regulation to such a limbo.[24] Instead, this Court and lower courts have resolved, rather than deferred, issues of agency power when tendered in a concrete factual setting. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59 (1978); *Independent Bankers Association of America* v. *Smith,* 534 F.2d 921, 926-930 (D.C. Cir. 1976).[25]

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[24]Thus, "final agency action" has been found in interpretative orders, Frozen Foods Express v. United States, 351 U.S. 40 (1956); regulations announcing agency policy, United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); orders embodying future agency policies, Continental Air Lines, Inc. v. CAB, 522 F.2d 107 (D.C. Cir. 1974); adjudicative decrees with precedential impact for the future, Association of Bituminous Contractors v. Andrus, 581 F.2d 853 (D.C. Cir. 1978); and in correspondence setting forth an agency's fixed statutory interpretation, Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119 (4th Cir. 1977). It is obvious that the Secretary's present fixed position with respect to her statutory authority constitutes final agency action posing a purely legal question appropriate for immediate judicial resolution.

[25]*Accord: Fort Sumter Tours, supra,* 564 F.2d at 1123-1124; *Continental Air Lines, supra,* 522 F.2d at 122-128; Air Line Pilots Ass'n v. Department of Transportation, 446 F.2d 236, 240-243 (5th Cir. 1971); Dow Chemical v. Consumer Product Safety Commission, 459 F. Supp. 378, 385-387 (W.D. La. 1978); Standard Oil Co. v. Federal Energy Administration, 440 F. Supp. 328, 365-366 (N.D. Ohio 1977), *aff'd,* 596 F.2d 1029, 1038-1040 (T.E.C.A. 1978).

The Government also appears to suggest, in its short discussion of Rule 54(b), that plaintiffs were necessarily relegated to one "claim" because the case arose out of one set of facts (Government Brief, pp. 41-42). But the mere fact that two claims for relief are factually interrelated does not mean that a final disposition of either in advance of the other may not be made within the meaning of Rule 54(b). *Sears, Roebuck & Co.,* v. *Mackey, supra,* 351 U.S. 427, long ago put that theory to rest. In *Sears,* this Court sustained the appealability under Rule 54(b) of an order dismissing two counts of a complaint while leaving for further disposition two other counts, notwithstanding the fact that one of the counts dismissed and one remaining were based on common facts. This Court held that since the counts "*can* be decided independently of each other," 351 U.S. at 436 (Court's emphasis), entry of an order dismissing one count was a final order and a proper exercise of district court's discretion under Rule 54(b). In this case, not only *can* the claim denied (declaratory and injunctive relief barring the agency from waiving the statutory bar for any CDS vessels) be disposed of independently from the claim remaining on remand (whether such waiver was appropriate for the STUYVESANT in consideration of its competitive effects on plaintiffs), but resolution of the remaining issue could not affect resolution of the decided issue.

With the elimination of the argument that plaintiffs sought only to bar the STUYVESANT (or were legally permitted to seek only the bar of that one vessel either because of the "case or controversy" requirement or because only one claim can arise from one set of facts), the Government's long and learned exegesis on the finality requirement of section 1291 becomes irrelevant. As the Government itself recognizes, Rule 54(b) is precisely ap-

plicable where an order completely determines one or more but fewer than all of the claims advanced in a lawsuit (Government Brief, p. 40). The district court properly applied Rule 54(b) in entering its order and the court of appeals properly construed its jurisdiction as well.[26]

B. The Order Appealed From Was Final And Appealable Under 28 U.S.C. § 1291.

Even if it were not clear beyond dispute that ABC and Trinidad brought this action to seek a declaratory order and an injunction going beyond the disqualification of the STUYVESANT so as to prohibit the agency from lifting the bar against permanent operation of any CDS-built vessel in the domestic trade, cases in the courts of appeals indicate that a remand of the nature ordered here would not detract from the finality of the decision respecting the Secretary's statutory authority. Several decisions by the courts of appeals have held that an order remanding a case to an agency for further proceedings *may* qualify for appellate review under 28 U.S.C. § 1291 where the issue determined in ordering the remand could not be reviewed at a later stage of the case and agency compliance with the remand order would thus effectively moot that issue on

[26]In this connection, it should be noted that the district court's determination that its order was proper under Rule 54(b) was acted on not only by plaintiffs, but also by Seatrain *and the Government*, which appealed therefrom (an appeal later dismissed upon Goverment motion), and was concurred in by the court of appeals which reviewed the order without questioning its jurisdiction, and by the *en banc* court of appeals which refused to reconsider the panel's decision although the Government first raised this jurisdictional challenge in its suggestion for rehearing *en banc*. Clearly it would have been imprudent for plaintiffs to delay taking their appeal after they were on notice that the district court considered that it had issued a final order under Rule 54(b). *See WRIGHT, supra*, p. 27 n. 18.

further review of the agency decision. In *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds sub nom., Richardson* v. *Perales*, 402 U.S. 389 (1971), the court permitted an immediate appeal of a decision of the district court which had remanded a case to an agency directing the agency to admit evidence theretofore barred. The court reasoned that if the agency's decision admitting the evidence was challenged by subsequent review proceedings, the second review would encompass issues going only to the weight of the evidence, thereby effectively barring the appellant from obtaining appellate review of the earlier ruling holding the evidence admissible. Similarly, in *Gueory* v. *Hampton*, 510 F.2d 1222 (D.C. Cir. 1975) the court of appeals held immediately appealable a district court order remanding a case to an agency because the court reasoned that the legal standards which the district court directed the agency to apply on remand would not be subject to appellate review on a second appeal from the agency decision applying those standards.[27] Thus orders remanding cases to agencies have been held final within the meaning of § 1291 where the opportunity for review of the appellate decision ordering remand would not be preserved upon further judicial scrutiny of the agency decision on remand.

The deciding principle of these cases is directly applicable to the case at bar. Despite the Government's bland assurances to the contrary (Government Brief, p. 30 n. 30) there is no way to know whether *appellate* review of a district court review of the agency's decision on remand would occur, or, if it did, whether the issue of agency authority would be preserved for appellate consideration.

[27]*See also* Citizens To Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and Wells v. Southern Airways, Inc. 517 F.2d 132 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) in which courts of appeal also reviewed district court orders remanding cases for further agency proceedings.

It is impossible to be certain that appellate review of the predominant issue of agency authority would be available because it is impossible to predict the future course on remand. If, for example, the Secretary had determined upon remand that the competitive effects of the STUYVESANT upon plaintiffs and others were such as to withhold from exercising the waiver authority (or if the district court reversed an agency decision on remand which determined the waiver for the STUYVESANT was proper), the agency power would no longer be open to appellate review, and the district court decision would be binding. While the STUYVESANT would be barred from the trade right now, assuming, *arguendo,* this was all that the complaint had sought, there is nothing in the district court opinion that would have restricted the agency from "waiving" the bar in the future for the STUYVESANT. The district court opinion did not restrict the Secretary's waiver power to the moment a vessel begins to operate, and such power could be deemed to include later waivers dependent only upon repayment of "unamortized" subsidy (see discussion *infra,* pp. 53-54 & 102-103). Plaintiffs would then be finally precluded from challenging the decision rendered in the district court on the issue of agency authority although that decision would have binding, precedential effect, as to both the STUYVESANT and all other CDS-built vessels.[28]

If, *arguendo,* appellate review of a district court decision reviewing the order on remand *were* an assured avenue open to plaintiffs, it is still by no means clear

[28]Thus ABC and Trinindad would be unable to submit for appellate review a lower court opinion that made a 5,000,000 deadweight aggregate tonnage market, built years ago at a fraction of the cost of current construction, "waivable" into the Jones Act fleet at the discretion of the Secretary, a holding immediately devaluing plaintiffs' existing assets and halting its future growth.

whether the issue of agency authority ever to waive the statutory power would be preserved for appellate consideration at that later stage. Since the district court had dismissed the case, the record on remand, and in district court on review of the remand order, would not encompass any of the facts or arguments relating to the issue of statutory authority. In fact, the appeal of the decision on remand, filed by respondent Shell, was newly docketed (No. 78-1919). The old record in Nos. 77-1645 and 77-1647 was closed. For the court of appeals to review the issue of agency authority, the earlier record, from which no appeal had been taken, would have to be certified up; yet the earlier case stood dismissed, and the time for appeal would long since have expired. *And of course if Rule 54(b) had been properly invoked by the district court, plaintiffs would have been time barred.* The course the Government now recommends would have been hazardous at best, and, if the district court and the court of appeals properly interpreted Rule 54(b), that course would have been fatal.

Coopers & Lybrand, supra, cited by the Government, does not detract from the principles set forth in the appellate decisions cited *supra,* pp. 36-37, or their applicability here. *Coopers & Lybrand* considered whether an admittedly interlocutory order of the court of appeals fell within that "small class" of cases exempted from the finality requirement of 28 U.S.C. § 1291 under *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), because it conclusively determined an important issue completely separate from the merits of an action, and was effectively unreviewable on appeal from a final judgment. Attempts to define that "small class" have been legion,[29]

[29]Cases following *Cohen* have not delineated with precision those orders which, although technically interlocutory, should nonetheless be immediately appealable because of their finality as a practical mat-

but all involve admittedly interlocutory orders which are not final dispositions of one or more of multiple claims. While not all cases in which a remand order is issued automatically qualify for the "small class" exception, as

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ter with respect to a qualifying collateral matter. Fifteen years after *Cohen*, in Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), this Court expanded the class by giving the finality requirement a "practical rather than a technical construction," introducing a finality test which balanced "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153. Ten years after *Gillespie*, this Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) held immediately appealable an order assessing notice costs, an appellate court having previously reviewed "a death knell" certificate denying class certification. While the order assessing costs may have survived Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the central collateral issue in *Eisen* fell with *Coopers & Lybrand* as an order qualifying for *Cohen* treatment. The balancing test of *Gillespie* as a gloss upon *Cohen* may have survived *Coopers & Lybrand* in the determination of "final" issues qualifying for Supreme Court review in appeals from state courts wherein federal and state issues are combined, the federal issue determined, but the litigation not ended. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 486-487 (1975). Three years after *Eisen*, in Abney v. United States, 431 U.S. 651 (1977), the Court applied *Cohen* not only to collateral orders that "finally determine[d a claim] of right," but also to a category of "fully consummated decision[s]." 431 U.S. at 659. In *Abney*, a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was held to fall within the class, because "the rights conferred on a criminal accused by the Double Jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence," 431 U.S. at 660, even though review of the double jeopardy argument would have been available after conviction. *Abney* was not, however, expanded to include a "collateral" order denying a motion to dismiss an indictment on grounds of denial of a speedy trial, because such denial would not "cause or compound the deprivation already suffered." United States v. MacDonald, 435 U.S. 850,861 (1978). The following year this Court held an order denying a motion to dismiss an indictment based on the Speech or Debate Clause immediately appealable. Helstoski v. Meanor, 442 U.S. ____, 99 S.Ct. 2445 (1979). Thus in the criminal field, perhaps, it is less the "collateral" nature of

the cases cited by the Government show (Government Brief, p. 29),[30] some do. Thus *had* plaintiffs' claim for

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the order than its impact which is the touchstone of the *Cohen* application.

One observation which we think will survive in this area is Justice Powell's statement in *Eisen, supra*, that:

> "[W]hile the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

and his further observation that

> "[A]s long ago as 1892 the Court complained: 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality decrees. . . . The cases, it must be conceded are not altogether harmonious.' " 417 U.S. at 170 n.9.

An aphorism chronicling the cases and presaging the statement, *supra*, from *Eisen* was the observation that the final decision rule is "'. . . a labor saving device which causes more labor than it saves." Crick, "The Final Judgment As A Basis Of Appeal," 41 Yale L.J. 539, 558 (1932).

[30]In some of these cases the district court had expressly retained jurisdiction: Freeman v. Califano, 574 F.2d 264 (5th Cir. 1978); Giordano v. Roudebush, 565 F.2d 1015 (8th Cir. 1977); Silver v. Secretary of the Army, 554 F.2d 664 (5th Cir. 1977); Dalto v. Richardson, 434 F.2d 1018 (2d Cir. 1970); most of the cases involved remands for further proceedings based upon procedural errors, deciding none of the claims for relief; Barfield v. Weinberger, 485 F.2d 696 (5th Cir. 1973); Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972); Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968) (in *Bohms*, the remand order left all issues open, and the judge had expressly refused to certify his remand order for interlocutory review under 28 U.S.C. § 1292(b)); one of the cases held that a suit for enforcement of an award by the National Railway Adjustment Board resulting in a remand is not final, analogizing the situation to the issuance of a stay pending arbitration: United Transportation Union v. Illinois Central R.R., 433 F.2d 566 (7th Cir.

relief encompassed only relief against the operation of the STUYVESANT, a persuasive case might be made that the district court decision sustaining the agency's authority was immediately appealable under 28 U.S.C. § 1291. Certainly that decision determined an important issue and, because the case stood dismissed, it appeared to have foreclosed that issue from further review. It would be the issue on remand, rather than the issue determined by the first decision, which would then be separate from or collateral to the merits of the action. While the Government's general statement (Government Brief, p. 29) that remands to an administrative agency ordinarily do not constitute final decisions is correct, the cases cited as appellate applications of that principle are factually far less comparable to the case at bar than *Cohen* v. *Perales, supra,* or *Gueory* v. *Hampton, supra.*

1970), *cert. denied,* 402 U.S. 915 (1971); and one of the cases held that the district court decision *was* final under 28 U.S.C § 1291 as qualifying for the *Cohen* exception to the finality rule: Ringsby Trucklines, Inc. v. United States, 490 F.2d 620, 624 (10th Cir. 1973). Of all of these cases, ony Bachowski v. Usery, 545 F.2d 363, 373 (3d Cir. 1976) considered the application of the *Perales* doctrine, *supra,* p. 37, and held that appealability of the order there involved would require an extension of that doctrine.

C. If The Order Appealed From Was Not Final And Appealable Under Rule 54(b) Of The Federal Rules Of Civil Procedure Or 28 U.S.C. § 1291, It Was Appealable Under 28 U.S.C. § 1292(a)(1) As An Interlocutory Order Denying An Injunction.

Even if, *arguendo,* the court of appeals lacked jurisdiction under Rule 54(b), or under 28 U.S.C. § 1291, the case was properly before the court of appeals under 28 U.S.C. § 1292(a)(1).[31] In granting defendants' summary judgment on all claims except the claim remanded, the district court finally denied ABC's and Trinidad's request for an injunction. Courts of appeals uniformly have taken jurisdicton under 28 U.S.C. § 1292(a)(1) over denials of requests for permanent injunctions, providing that such denial did not represent merely a postponement of a decision on the request. *Ackerman-Chillingworth* v. *Pacific Electrical Contractors Association,* 579 F.2d 484, 489 (9th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979); *Paeco, Inc.* v. *Applied Moldings, Inc.,* 562 F.2d 870,879 (3d Cir. 1977); *W. L. Gore & Associates, Inc.,* v. *Carlisle Corp.,* 529 F.2d 614, 617-618 (3d Cir. 1976); *McNally* v. *Pulitzer Publishing Co.,* 532 F.2d 69 (8th Cir. 1976), *cert. denied,* 429 U.S. 855 (1976); *Wrist-Rocket Manufacturing Co., Inc.* v. *Saunders Archery Co.,* 516 F.2d 846, 849 (8th Cir. 1975), *cert. denied,* 423 U.S. 870 (1975); *Equal Employment Opportunity Commission* v. *International Longshoremen's Association,* 511 F.2d 273, 276-277 (5th Cir. 1975), *cert. denied,* 423 U.S. 994 (1975); *Medical Development Corp.* v. *Industry Molding Corp.,* 479 F.2d 345, 347 (10th Cir.

[31]This section grants courts of appeals jurisdiction from ". . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . ."

1973); *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 461 F.2d 1040, 1042 (2d Cir. 1972). *Equal Employment, supra,* considered at length whether there was any bar to appellate jurisdiction on an appeal from an interlocutory order denying a permanent injunction, as distinguished from a preliminary injunction and concluded that there was none, basing its decision not only on the language of the statute, which admits of no such distinction, but also upon consideration of the policy against piecemeal appeals, which is not subverted by preserving the right to appeal from a denial of a permanent injunction so long as that injunction finally resolves the issue under consideration. 511 F.2d at 276.[32]

[32]While this Court has not directly addressed the issue, the opinions of this Court indicate that the thus far uniform appellate interpretations of § 1292(a)(1) are correct. Thus in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966), this Court held that denial of a permanent injunction on the grounds that there remained triable issues of fact did not constitute the kind of interlocutory order denying an injunction comprehended by 28 U.S.C. § 1291(a)(1). In so holding, this Court took pains to point out that its decision was not based on the view that " 'interlocutory' or preliminary may not at times embrace denials of permanent injunctions, but because the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25. By contrast, here the denial of a permanent injunction finally decided the merits of the claim. In *Liberty Mutual, supra,* pp. 31-32, 424 U.S. 737, 744-745, this Court indicated that review of an order deciding the merits of the action in plaintiff's favor, but declining to issue an injunction at the time of decision, did not constitute an appealable order under § 1292(a)(1) because the party appealing was not the party who had been denied the injunction, but was instead the party who had lost on the merits. The Court said that ". . . even if this [the denial of an injunction] would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction." *Id.* In *Sears, Roebuck, supra,* p. 35, the dissenting Justices, who dissociated themselves from the holding that an order dismissing two

The Government argues that there was no final decision with respect to the denial of an injunction because an injunction might have issued against the permanent operation of the STUYVESANT in the Alaskan oil trade following review of the Secretary's decision on remand. Once again, the Government obdurately refuses to recognize the reach of the complaint. In the prayer for relief, ABC and Trinidad clearly asked for an injunction going to the exercise of the agency's authority to lift the statutory bar for any and all CDS vessels, not just the STUYVESANT,[33] and once again, that request for injunctive relief was finally decided adversely to plaintiffs by the district court's order of November 30, 1977.

counts of a complaint while two remained was a proper order under Rule 54(b), nevertheless concurred in the Court's result on the ground that the court of appeals had jurisdiction because such dismissal was an "interlocutory order denying an injunction" within the meaning of 1292(a)(1). 351 U.S. at 443. And in Smith v. Vulkan Iron Works, 165 U.S. 518 (1897), this Court, interpreting a predecessor statute to 28 U.S.C. 1292, which vested jurisdiction in appellate courts from orders granting or continuing injunctions, found jurisdiction to consider the merits of an order granting a permanent injunction although the case was not finally concluded by that order.

[33]Prayer (3) of the ABC/Trinidad prayer for relief asks the Court to issue an order: "(3) permanently enjoining the Secretary of Commerce the Maritime Administration and the Maritime Subsidy Board from amending any construction-differential subsidy contracts or taking any other action to lift the restrictions of Section 506 of the Merchant Marine Act, 1936 permitting the operation of vessels built with construction-differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year)" (A. 63). This prayer was in *addition* to the prayer requesting injunctive relief to bar the STUYVESANT which was set forth in these terms: "(1) permanently enjoining the agency from taking any steps to carry out the actions set forth in two letters each dated August 31, 1977 from MarAd/MSB, to Polk Tanker Company and Queensway Tankers, Inc. and declaring all such actions null and void." (A. 62).

Accordingly, the Government's entire discussion on the inapplicability of section 1292(a)(1) has no reference to the facts of this case. Under existing appellate precedent, the court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1) if the order of November 30, 1977 is deemed interlocutory.

II. THE SECRETARY OF COMMERCE LACKS POWER TO WAIVE THE RESTRICTIONS AGAINST OPERATION IN THE DOMESTIC TRADES OF VESSELS BUILT WITH CONSTRUCTION-DIFFERENTIAL SUBSIDY.

A. The Statutory Framework For Government Assistance To The United States Merchant Marine Does Not Permit The Grant Of Construction-Differential Subsidy for Vessels That Will Permanently Serve The Domestic Trades.

The court below began its statement of the case with the observation, unchallenged here, that "[i]t has long been recognized that the cost of building ships in U.S. shipyards, and likewise the cost of operating vessels with American crews and according to American safety standards, is considerably higher than construction in foreign shipyards or operation with foreign crews. It has also long been recognized that an adequate merchant marine is vital to both the national defense and the commercial welfare of the United States." (Pet. App. 4a). These two realities are the underpinning of the maritime legislation relevant to this case – legislation designed to aid and promote the U.S. Merchant Marine.

Since the early days of this republic, there has been legislation reserving the "domestic trades", *i.e.*, commerce

between points in the U.S., to ships built and registered in the U.S.[34] This reservation is currently found in the Jones Act.[35] U.S.-built ships which can freely operate in the domestic trades are called the "Jones Act fleet" and these vessels are a distinct segment of the U.S. Merchant Marine. Because all ships operating in the domestic trades must be U.S.-built and operated, there has never been a need for cash subsidies to the Jones Act fleet and the Merchant Marine Acts do not provide for Government payment of cash subsidies to operators of vessels in the domestic trades (Pet. App. 5a).

In U.S. foreign commerce, there is no reservation of trade for U.S.-built and operated vessels. The congressional approach, in foreign commerce, was to seek to preserve at least a portion of foreign trade for such vessels. To accomplish that purpose, it was necessary to equalize the competitive position of ships both built in U.S. shipyards and operated under the U.S. flag. Direct cash subsidy was the method adopted to keep U.S. vessels competitive in U.S. foreign commerce.

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[34]Legislation setting forth this provision was first enacted in 1817. Act of March 1, 1817, ch. 31, 3 Stat. 351. A predecessor of the 1817 law, the second law passed under the new Constitution in 1789, imposed taxes on foreign vessels carrying U.S. goods between U.S. ports. An Act Imposing Duties on Tonnage, ch. 3, 1 Stat. 27 (1789).

[35]Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. § 883. This Act is designed "to protect the American shipping industry already engaged in the coastwise trade, to provide work for American shipyards, and to improve and enhance the American Merchant Marine." Marine Carriers Corp. v. Fowler, 429 F.2d 702, 708 (2d Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971). (The term "Jones Act' is often used to refer to Section 33 of the Merchant Marine Act, 1920, 46 U.S.C. § 688, which provides for recovery for injury to or the death of a seaman, but as used herein the term Jones Act refers to Section 27 of the 1920 Act).

The subsidy programs began in the mid-19th century with contracts providing subsidies for carrying the mail; this program was much abused, but continued even after the end of World War I when the U.S. found itself with a surplus of U.S.-built vessels. By the mid-1930s, the surplus had become a deficit again and, in 1936, Congress overhauled the structure of Government assistance for the U.S. Merchant Marine by passage of the Merchant Marine Act, 1936, 46 U.S.C. § 1101 *et seq.* (hereafter, "Act"). The Act replaced the program of mail subsidy contracts with a program granting private companies construction-differential subsidy (CDS) and operating differential subsidy (ODS). The subsidies were designed, respectively, to equalize the cost of building vessels in U.S. yards and operating vessels under the U.S. flag with the costs of foreign construction and foreign operation.

CDS was established by Title V of the Merchant Marine Act. The very first sentence of Title V (Section 501) establishes the threshold requirements for seeking government assistance in the form of a subsidy to build a ship in a U.S. shipyard. Two requirements are set forth: (1) the person making application must be either a proposed ship purchaser who is a citizen of the U.S. or else a shipyard of the U.S.; and (2) the purpose of the application must be for aid to construct a new vessel "to be used in the foreign commerce of the United States". 46 U.S.C. § 1151. Section 501 then sets forth the criteria to be applied by the Secretary of Commerce for determining whether to grant the application.

The next sections of Title V describe various methods whereby the construction of vessels in U.S. yards can be subsidized. For example, under section 502, the Secretary may pay for the entire construction of the vessel and may contract to sell it for a lower price. 46 U.S.C. § 1152. Section 504 provides an alternative to the section 502 method of participation in vessel construction: section 504 authorizes the Secretary to pay a subsidy and the cost of national defense features in lieu of paying the entire cost of the vessel. 46 U.S.C. § 1154. The agency customarily follows the section 504 alternative procedure.

Section 506 defines the trades which a vessel built with CDS may ply, and in so doing statutorily requires the consent of *every* owner of such vessel to use the vessel only in the described trades. 46 U.S.C. § 1156. The first sentence of section 506 begins: "Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or. . . ." on four defined intermediate domestic trades which may be served in the course of certain, defined, world-circling voyages in foreign trade. These four trades are hereafter referred to as "incidental domestic" trade or commerce. The first sentence of section 506 also provides for a pro-rata payback of subsidy, based on comparative vessel revenues, for incidental domestic trade. The second sentence establishes the only exception under which CDS-built vessels may operate in other than foreign or incidental domestic trade:

> "The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act."

The third sentence of section 506 requires a proportional payback of subsidy in the event of such six month transfer to trades other than foreign or incidental domestic, and

the fourth sentence provides that no ODS shall be paid while a vessel is temporarily in trades other than foreign or incidental domestic.

Vessels built with CDS for operation in foreign commerce are called the "subsidized fleet." Like the "Jones Act fleet," they form a distinct segment of the U.S. Merchant Marine. The Jones Act fleet, while legally free to do so, cannot economically compete in foreign trades with either foreign-built vessels or with the U.S. subsidized fleet because Jones Act vessels are built without subsidy and are far more costly to build and operate. Freight rates in the Jones Act trade are higher than freight rates for the subsidized fleet because Jones Act rates reflect unsubsidized construction and operation costs (Pet. App. 5a-6a).

There is no provision of the Act which grants to a potential ship purchaser the option of building, with government CDS, a vessel to be used in either the domestic or foreign commerce of the United States, with that decision to be deferred until either completion of construction, or, still later, during the economic life of the vessel. Petitioners argue that the Secretary has the inherent power to permit such a switch, provided that the "unamortized" portion of subsidy is refunded,[36] and provided the Secretary reasonably determines that such switch is necessary to carry out the purposes of the Act. While the Government apparently concedes that CDS ought not be granted with the understanding that it may be returned,

[36]The concept of "unamortized" subsidy derives from the notion that the benefits which the Government obtains from paying subsidy is the operation of a vessel during the term of its economic life. As that economic life progresses, the Government is "repaid" by the use of that vessel in foreign commerce and its availability for national defense. Thus the concept of "unamortized" subsidy refers to that portion of the subsidy which has not been "used up" by the vessel's operation in foreign trade for its full economic life.

allowing the ship to be used in any trade, if the owners later believe that trades not qualifying for subsidy have become more profitable than the permitted foreign trades,[37] both the Government and Seatrain argue that such switching fulfills the purposes of the Act where the intended foreign trade use disminishes and a domestic trade use materializes — at least in situations where government commitments, made under sections other than Title V of the Act and under other acts of Congress, may result in financial losses to the Government. The basic statutory framework, however, contains no hint of a permissible blending of the Jones Act and the subsidized fleets except for the two domestic trade uses permitted by Section 506: incidental domestic trade and six months per year. The basic statutory concept for CDS, as the court below held, was one of permanent dedication (Pet. App. 14a). To reinterpret that statutory framework to allow by administrative, not congressional, action a portion of the subsidized fleet to move into Jones Act trades whenever adversity threatens a particular venture is to accomplish a major restructuring of the Act for the sole purpose of rescuing both Seatrain and the Government from the consequences of unwise economic decisions.

[37]Government Brief, pp. 54-55 & n. 60.

B. Section 506 Clearly Establishes The Only Circumstances Under Which Vessels Built With CDS May Serve The Domestic Trades.

1. The Statutory Language Is Clear And Unambiguous: Vessels Built With CDS Are Barred From Domestic Trades Except (1) For Incidental Domestic Trade Or (2) Exclusive Domestic Trade For Periods Not Exceeding Six Months In Any Year.

Section 506 [38] explicitly deals with the domestic trading restrictions on CDS vessels and the circumstances in which those restrictions may be waived. The first sentence of section 506 mandates that "*Every* owner of a vessel" for which CDS "*has been paid* " (emphasis supplied) shall agree that the vessel shall be operated exclusively in foreign trade or in incidental domestic commerce, and mandates a proportional subsidy payback for such incidental domestic service. The very next sentence authorizes the agency to waive those geographic trade restrictions. The authority to grant the waiver is explicit and limited. The statute permits the agency to consent to the temporary transfer of a vessel to any service other than foreign and incidental domestic trade for a period not exceeding six months in any year. The following, third, sentence provides that when there is consent to such temporary transfer, there shall be a porportional payback of CDS. Except for the incidental domestic service, and the permissible temporary transfer to exclusive domestic operation for a period not exceeding six months in any year, there is no statutory entitlement to operate vessels upon which CDS "has been paid" in domestic service for longer than six months in any one year, upon payback of subsidy, upon promise to pay back subsidy, or upon any

[38]Section 506 is reprinted in full in Seatrain Brief pp. 19a-20a; Government Brief pp. 18a-19a.

other conditions. By contrast, the conditions upon which the temporary transfers to the domestic service for periods not exceeding six months are allowed are set forth by statute as dependent upon a Secretarial finding that such transfer "is necessary or appropriate to carry out the purposes of this [Act]," and proportional subsidy repayment is then required, "upon such terms and conditions as [the Secretary] may prescribe."

Petitioners argue that section 506 is irrelevant to a determination of whether the Secretary possesses the power to allow vessels built with CDS to switch to domestic service. Seatrain argues that section 506 addresses only the issue of domestic trading restrictions on a vessel "that still retains the financial benefits of the subsidy" and is "silent" with respect to a vessel "that once received, but has remitted in full, its subsidy" (Seatrain Brief, p. 26). The Government echoes this argument, contending that 506 addresses only the issue of "the extent and conditions of competition between the unsubsidized domestic fleet and ships that continue to enjoy the benefits of CDS financing" (Government Brief, p. 52).

The full answer to this argument is that this is not what the statute says. The statute does not say:

- "every owner of a vessel for which a construction-differential subsidy has been paid and has not been remitted;"or

- "shall be operated exclusively in foreign trade so long as the owner continues to enjoy the benefits of CDS financing;" or

- "the Secretary may also consent in writing to the permanent transfer of such vessel to service other than the service covered by such agreement

provided that the full [or the unamortized portion of the] subsidy has been repaid;" or

- "the Secretary may consent in writing to the permanent transfer of such vessel to service other than the service covered by such agreement upon determination that such transfer is necessary or appropriate to carry out the purposes of this chapter and upon such conditions as he may prescribe."

All of these alternative statutory formulations and permutations of the existing statutory language would support petitioners' formulation that there is a whole class of transfers to domestic service other than those set forth in section 506.[39] The fact that certain categories of transfers are permitted by statute, as *exceptions* to the general rule barring transfers, does not support the argument that there are other categories of transfers which, if not specifically *barred* as exceptions, are therefore implicit exceptions to the general prohibition. Recognized judicial canons of construction take the opposite and more logical tack.

The applicable canon of statutory construction is that where Congress provides specific exceptions to a general statutory rule, all exceptions not mentioned are excluded. *See National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974); *Continental Casualty Company* v. *United States,* 314 U.S.

[39]And the omission of such language is not without consequence. As stated by Judge Cardozo:

> "[A statute] is as significant for what it omits as for what it says." Moskowitz v. Marrow, 251 N.Y. 380, 399, 167 N.E. 506, 511 (1929) (Cardozo, C.J. concurring).

527, 533 (1942); *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d 1010, 1014 (5th Cir. 1968); *Gotkin* v. *Miller,* 379 F. Supp. 859, 865 (E.D.N.Y. 1974); *Herzberg* v. *Finch,* 321 F. Supp. 1367 (S.D.N.Y. 1971). Petitioners have cited no decision of this Court or any other court which applied the canon of statutory construction here suggested: when a statute sets forth a small class of exceptions, any other exception may be read into the statute provided only there is no specific language precluding such an exception.

Only recently, this Court has refused to read a statute which allowed an agency to taken an action limited in duration beyond the statutory time limitation – notwithstanding the agency's argument that such an expansive statutory reading was necessary to further its broad statutory mission. In *Securities & Exchange Commission* v. *Sloan,* 436 U.S. 103 (1978), the Securities & Exchange Commission had sought to issue a series of consecutive 10-day suspension orders under a statute which permitted it to summarily suspend trading "for a period not exceeding 10 days." The agency argued that as there was no statutory language precluding a series of suspension orders, the statute did not bar such a series, but merely limited the duration of any single order to ten days. This Court refused to expand the agency's powers by implying agency power to issue more than one suspension order, which would have effectively extended the time of suspension under a statute which established a 10 day time limitation for suspension orders. 436 U.S. at 111-112. So here, a statute which permits exclusive operation in the domestic trade for no longer than six months in any one year in the discretion of the agency cannot be deemed "silent" on the issue of whether longer operation in the

domestic trades is consigned to the discretion of the agency. To so interpret this statute would undermine the settled canons of statutory construction under which the legislature and judiciary have together created a government of laws.

Application of a second settled canon of statutory construction would result in affirmance of the decision below without further investigation of the "aids" to statutory construction so liberally offered by petitioners to evade the plain meaning of the Act. That canon is that where a statute is plain and unambiguous on its face, no resort to the legislative history is required. *United States* v. *Oregon,* 366 U.S. 643 (1961); *Ex Parte Collett,* 337 U.S. 55, 61 (1949); *Gemsco* v. *Walling,* 324 U.S. 244, 260 (1945); *United States* v. *American Trucking Associations,* 310 U.S. 534, 543 (1940). Again, only recently this Court had occasion to apply that principle. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978).[40]

The statute is so plain and unambiguous on its face, creating two exceptions to a bar against the operation of a CDS-built vessel in the domestic trade, neither of which exception authorizes the waiver of that bar for exclusive, long-term operation in domestic trade, that petitioners' lengthy discussions of legislative history of the enacting Congress, prior Congresses, later Congresses, and subsequent administrative constructions, are unnecessary to establish the bounds of administrative power. The authorities cited and arguments urged by petitioners are discussed below to show that neither the legislature which

[40]437 U.S. at 184 n. 29. The Court in *Tennessee Valley Authority* stated the applicable principle of law as follows:

> "When confronted with a statue which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Id.*

enacted the present section 506 nor any subsequent legislatures have evidenced an intention that the Act should be constructed other than as written.

2. The Legislative History of Section 506 Reveals That Congress Did Not Intend The Agency To Have Any Power To Waive The Bar Against Transfer Of A CDS-Built Vessel Into Domestic Trades For Periods Exceeding Six Months In Any Year.

Petitioners argue that the legislative history supports their construction that Congress intended the Secretary to have the power to waive the restriction against the operation of CDS-built vessels in the domestic trade for periods longer than six months upon repayment of subsidy or repayment of the unamortized portion of the subsidy. The argument runs that Congress intended to confer such power upon the Secretary in the 1936 Act, as shown by the section 506 then enacted; that section 506 contained an ambiguity concerning whether pro-rata repayment of subsidy was required for temporary transfer (of no more than three months, under the 1936 Act) or for incidental domestic commerce;[41] that to clarify such ambiguity Congress amended section 506, deleting the provision which empowered the Secretary to authorize permanent transfers; that such deletion was inadvertent, or perhaps was intended by the then chairman of the agency, Commissioner Kennedy, but not by Congress; and therefore the

[41]The Government argues that the "ambiguity" which the 1938 amendments were designed to cure was whether prorata payback was required for temporary transfers (Government Brief, p. 60) while Seatrain says the ambiguity was whether such payback was required for both "incidental or temporary domestic trade" (Seatrain Brief, p. 43). The extra Seatrain ambiguity is an invention. See text, *infra,* pp. 70-71.

congressional intention respecting the Secretary's power should be respected by the courts. The evidence gathered by petitioners does not support this labored argument, and indeed the legislative history refutes it.

(a) *The 1936 Statute.*

We start with section 506 as enacted in 1936, reprinted in the footnote below.[42] An argument may be made that

[42] Sec. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in doemstic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year." Act of June 29, 1936, ch. 858, § 506, 49 Stat. 1999.

The Government reprint of the original section 506 (Government Brief,pp. 59-60 n. 65) omits the last sentence of 506 as the statute was enacted in 1936.

this section, as originally enacted, permitted three exceptions to the requirement that a CDS-built vessel be operated only in foreign trade: (1) incidental domestic trade; (2) operation in any domestic commerce at any time, provided total "unamortized" subsidy is paid back "upon such terms and conditions" as the agency requires; and (3) emergency transfer to domestic trade not to exceed three months. Under this reading subsidy payback was required proportionately for incidental domestic commerce, and total "unamortized" subsidy was required if the Commission lifted the bar against domestic operations other than incidental domestic trade.

Whether the 1936 Congress actually intended to authorize CDS for vessels which could so freely later switch to the domestic trades, however, is by no means as clear as petitioners suggest. For example, the bill originally introduced and reported in March 1936 by Senator Copeland did not, as Seatrain represents (Seatrain Brief, p. 35), permit a subsidized vessel's permanent return to the domestic trade solely upon agency consent and subsidy repayment. While section 506(b) of this bill contains the language that no CDS-built vessel "shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the authority so to operate and prior to such operation shall pay to the

United States" the unamortized subsidy, section 506(c) of that same bill, not cited by Seatrain, provided that:

> "In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel."[43]

[43]See S. 3500, 74th Cong., 2d Sess. (Committee print, March 3, 1936). Other predecessor bills to the 1936 statute containing equivalent threshold requirements for transfer were S. 2582, 74th Cong., 1st Sess. (as reported May 24, 1935); H.R. 8555, 74th Cong., 1st Sess. (June 19, 1935); H.R. 8555, 74th Cong., 1st Sess. (June 27, 1935); S. 3500, 74th Cong., 2d Sess. (January 6, 1936); S. 3500, 74th Cong., 2d Sess. (March 26, 1936).

While the Guffey bill, S. 4100, 74th Cong., 2d Sess. (1936), cited by petitioners (Seatrain Brief, pp. 36-37; Government Brief, pp. 58-59) did not contain these threshold requirements before any transfer from foreign to domestic trade was permitted by the Secretary, it did require repayment of unamortized subsidy "prior to such operation" in non-foreign trade. The Guffey bill was not "essentially adopted . . . as section 506" of the Merchant Marine Act as the Government contends (Government Brief, p. 59). Section 506 as enacted in 1936 bore as much or more resemblance to Senator Copeland's bill and the House bills as to Senator Guffey's. Thus the requirement of prior payment contained in the Guffey bill was omitted, and payment of unamortized subsidy appeared conditioned only upon such terms and conditions as the Commission might prescribe; in other bills and in the statute as enacted, but *not* in the Guffey bill, (1) the permitted incidental domestic commerce was described in detail; (2) national defense features were excluded from the repayment provisions; and (3) prorata repayment for incidental voyages was required. Seatrain more accurately (p. 37) characterizes the enacted section 506 as containing "the essential terms" of Senator Guffey's bill (Seatrain Brief, p. 37). Indeed it did, as it contained the "essential terms" of virtually all of the predecessor bills.

Nevertheless, assuming *arguendo* that the language of section 506 as enacted in 1936 did permit the unlimited transfer to domestic trades of vessels built with subsidy upon repayment of unamortized subsidy, that is no longer the law. Section 506 was entirely rewritten in 1938, and the language to which petitioners point with satisfaction is no longer in the statute. The legislative history of the 1938 amendment shows that the later Congress purposefully and explicitly rewrote section 506 in its entirety, and in so doing *intentionally removed* the language upon which petitioners rely – language characterized by that Congress as "confusing" and "ambiguous".

(b) *The 1938 Amendment.*

The court below held that whatever the "sponsors of the 1936 Act" intended, the action of Congress in 1938 removed from section 506 "the only language which could be interpreted to authorize more than a temporary waiver of the restriction against employment in the domestic trade." (Pet. App. 27a-28a). The court characterized the intention of that Congress as unmistakable in (a) its elimination of the only statutory language which could arguably have authorized the Secretary's action here, and (b) its limitation of the waiver into domestic trade to six months in any year with "no discretion in the Secretary to authorize a longer period." (*Id.* at 28a). The court below found that the 1936 version of the section 506 was susceptible to two readings: that both unlimited and temporary three-month waivers of the foreign trade requirement were authorized, *or* that only temporary waivers were authorized. The court further found that the possibility of these conflicting readings was the ambiguity which the agency expressed to Congress in 1938 when section 506 was completely rewritten (Pet. App. 22a-23a & n. 44).

Petitioners seek to argue here that the court below was wrong, because Congress' elimination of the language arguably conferring upon the Secretary the disputed authority was done inadvertently, in the course of clarifying a totally different ambiguity. They claim that the ambiguity which Congress addressed was whether or not proportionate subsidy payback was required for the temporary transfer of a CDS vessel to the domestic trade (Government Brief, p. 60) or, in Seatrain's formulation, for "incidental or emergency temporary trading" (Seatrain Brief, p. 39). The argument does not stand up against the legislative background.

The actual "ambiguity" which Congress intended to clarify is clearly revealed upon a careful reading of two pieces of legislative history explaining the reasons for the 1938 changes: the congressional statement of the then Chairman of the Maritime Commission (Joseph P. Kennedy) and the pertinent Senate Commerce Committee Report. Mr. Kennedy's statement contains three essential paragraphs — the first explains the problem that he saw with the 1936 version of section 506, and the latter two explain the solution as embodied in the 1938 amendment. The problem was stated as follows:

> "The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to

> periods of 3 months as mentioned in the section, it is difficult to determine."[44]

The first two sentences of the above statement are obviously intended to convey what the 1936 Act permitted or might be read to permit. The first sentence refers to services that may be performed without Commission consent, and the second sentence refers to *other* services which require Commission consent. Under the 1936 statute, the services which required Commission consent were *not* services in incidental domestic trades, but were three-month domestic trade transfers and, perhaps, permanent transfers to domestic trade. The only "enumerated" services excepted from the foreign trade requirement were incidental domestic trades, which were, indeed, enumerated, in the sense that each of the four permissible incidental domestic uses was described *seriatim* in the beginning of the original 1936 statute. Thus in the first sentence, Chairman Kennedy was clearly describing foreign and incidental domestic service which could be performed by CDS-built vessels without agency consent. In the second sentence, he was describing services (for which consent is required) *other* than those services he had described in the first sentence — *i.e., other* than foreign and enumerated incidental domestic services.[45] It is in the second sentence, when Chairman Kennedy talks about services other than in foreign and incidental domestic trades, that he first

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[44]Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d & 3d Sess. 8 (1937-1938) (hereafter, "House Hearings on the 1938 Amendments).

[45]Taken together, the first two sentences show that Kennedy interpreted the Act as requiring prorata repayment of subsidy *whenever* the operator engaged in other than foreign trade: either incidental domestic service, three month transfer, or, arguably, a permanent return to the domestic trade.

refers to a "right;" the third sentence then queries whether that "right" is restricted only to cases of emergency and three months. Clearly, Kennedy was querying whether there existed, side by side, two concomitant rights to engage in services other than foreign and incidental domestic service. He was unclear (" . . . it is difficult to determine . . .") as to whether the statute conferred a three-month right *and* a permanent right (both of which require his agency's consent), or whether the statute conferred only the former, three-month right. In no way can this paragraph be read as an inquiry into the necessity of paying back subsidy, which is the "ambiguity" petitioners urge as the reason for the 1938 clarification.

This obvious interpretation is confirmed by the ensuing two paragraphs of Mr. Kennedy's statement which describe the suggested amendment, now enacted:

> "As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.
>
> If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year. If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be determined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy."[46]

In describing the recommended solution to the problem, Chairman Kennedy's format is identical to the format he used when stating the problem. Thus the first of the just-quoted paragraphs stating the solution relates to incidental domestic trades, as did the first sentence stating the problem; and the second paragraph, stating the balance of the solution, refers to domestic trades *other* than incidental domestic trades, as did the second sentence stating the problem. In describing section 506 as rewritten, Kennedy first says that if an owner wants to engage in incidental domestic service, again described as "services, other than foreign, which are enumerated," he may do so provided he repays subsidy, prorata. Next, Kennedy says that for all domestic trades "other than those enumerated" (again, other than incidental domestic trades), Commission consent is required and that consent "is limited to six months in any one year."

Thus Chairman Kennedy said that the rewritten section answered precisely the question he had asked about the original section, which was whether a *right* to engage in services other than foreign and incidental domestic trades was restricted to cases of temporary three-month transfers or whether that right also included permanent transfers. His difficulty in answering that question by reference to the original section was solved in the proposed amendment by providing for only one allowable use — a temporary

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[46]House Hearings on the 1938 Amendments, *supra,* at 8.

transfer – and its maximum duration was increased from three to six months in any one year.

Petitioners argue that Mr. Kennedy identified the wrong ambiguity – indeed that his ambiguity "strains credibility" (Seatrain Brief, p. 43). But if the 1936 Act, as petitioners contend, did allow unrestricted transfer to domestic trade upon repayment of subsidy, and also allowed an emergency transfer for three months, does it so strain credibility that an administrator might find it ambiguous and confusing that the Commission had two powers side by side: (1) to allow such unrestricted transfer with a proportionate payback, and (2) to allow only a three-month transfer? Why circumscribe transfer to domestic trade to cases of "emergency" and three months and at the same time permit unrestricted transfer to domestic commerce? Did the 1936 Congress intend to confer two rights of transfer, or is the three-month right the only permissible application of the statutory formula set out immediately preceding the "three-month" sentence?

But whether or not Mr. Kennedy was rightly or wrongly confused by trying to reconcile the simultaneous "consents" which his agency might have been authorized to give is beside the point. Mr. Kennedy, not petitioners, was seeking a restructuring of section 506 from the Congress. In so doing, he stated *his* confusion, which was not the confusion that petitioners seek to impute to the 1938 Congress as the reason for rewriting section 506. Kennedy's confusion was whether the ability to transfer to the domestic trades was restricted to three months per year or whether there also existed a second right of transfer, of unlimited duration. His solution was to confer only one right: six months.

Seatrain appears to concede (Seatrain Brief, p. 44) that perhaps Chairman Kennedy intended to delete any

unlimited authority in the 1936 statute, but states that Congress did not. Seatrain's argument is that there is no indication that Congress' purposes were the same as Chairman Kennedy's. The argument that Congress had a different reason for rewriting section 506 than did Chairman Kennedy is refuted by the relevant legislative history, only part of which is cited by Seatrain.

The part not cited by Seatrain is the statement of the author of the amendment, S. 3078, Senator Copeland, which said that Congress' purposes were the same as Mr. Kennedy's and the Maritime Commission's:

> "The pending bill, S. 3078, is founded on the recommendations of Chairman Kennedy and the Maritime Commission. Some modifications have been made, but no new matter has been added to the bill by the entire committee which studied it. *It has been written wholly in the light of suggestions which come from the Maritime Commission and to a great extent uses its language.*" 82 Cong. Rec. 6471 (May 9th, 1938) (emphasis supplied).

The part cited by Seatrain (Seatrain Brief, pp. 45-46), the Senate Report,[47] restates the ambiguity identified by Chairman Kennedy in almost identical language. The Senate Report's statement of the problem is as follows:

> "The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade or in other enumerated voyages to foreign ports, which may

[47] S. Rep. No. 1618, 75th Cong., 3d Sess. (1938).

include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These provisions are definite. *The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the construction-differential subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months."*[48]

The Senate Report follows the same format as Chairman Kennedy. The first sentence says that it is unlawful to operate, without the consent of the Commission, in other than foreign trades or "enumerated voyages to foreign ports, which may include domestic ports." Again, the Senate uses "enumerated" to describe incidental domestic trading which is lawful and which requires no agency consent. The second sentence refers to the three month emergency transfer provision, which does require Commission consent. The Senate Committee says, this much we know about the statute: "These provisions are definite." The italicized sentences state the dilemma. First, the Senate Report defines the scope of the uncertainty, which concerns services "*other* than those *which are not unlawful.*" Services *other* than those which are *"not* unlawful," *i.e.*, services other than the lawful ones, means

[48] *Id.* at 12-13 (emphasis supplied).

services in trades *other* than foreign and incidental domestic trades, since foreign and incidental domestic trades are expressly lawful. The Senate Report asked whether such other-than-lawful uses (which it had just defined as the problem area in which it said subsidy repayment is required) were restricted to cases of emergency and to periods of three months. Thus the Senate Report, following Kennedy's reasoning,[49] assumed that prorata CDS repayment for any use other than the lawful use is required, but queried whether those *instances* of use in other-than-lawful trades are restricted to the cases of emergency and limited to three month transfer, or whether longer periods are also authorized.

The Senate Committee was clearly not talking about whether repayment was required for incidental domestic trading. It was talking about "whether or not these *instances* in which repayment is required are restricted to the cases of emergency and to periods of three months." The Senate Report assumed that prorata repayment was indeed required for any other-than-lawful use, *i.e.*, three month use, but ascribed the confusion as to whether or not there were *other instances* in which repayment was also required. Such other instances would be use in domestic commerce for periods *exceeding* three months. The "instances" could not include incidental domestic trades (*i.e.*, "enumerated" trades) which the Senate Report described as lawful and as contained in provisions which were "definite."

The Senate Report thus said exactly what Chairman Kennedy said: aside from incidental domestic commerce, which was not unlawful, is there more than one "right" or "instance" of use by CDS-built vessels in domestic trade: (1) unrestricted use in domestic trade, and (2) three-

[49] See Kennedy statement, *supra*, pp. 62-63 & n. 45.

month emergency use, or is the right to engage in domestic commerce other than lawful incidental domestic commerce restricted to cases of three months in an emergency? Neither the Senate nor Chairman Kennedy was talking about confusion or ambiguity with respect to whether subsidy repayment was required for three-month use, as well as unrestricted use; both believed that prorata return of subsidy was required certainly for the three-month transfer and for beyond-three-month transfer, *if such use were permitted.* The "if" was the question for which resolution was sought by the 1938 legislature.

Seatrain argues (Seatrain Brief, pp. 46-47) that the Senate Report did not echo the Kennedy ambiguity, but referred to the Seatrain ambiguity. Thus Seatrain states:

> ". . . the report defines the primary difficulty with the original § 506 as the uncertainty whether proportionate CDS repayment is required for the incidental domestic trading permitted by the statute."

But this interpretation of the Senate remarks is absurd, because that ambiguity is non-existent. The original section 506 provided for a proportional CDS repayment for incidental domestic trading in the last sentence of the section.[50] ***This is the sentence which Seatrain appears to have***

[50] "Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in [incidental domestic trade] that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year."

The 1936 version of section 506 is set forth in its entirety *supra* at pp. 58-59 n. 42.

overlooked in reading the original section 506 and the sentence omitted from the Government citation of the original 506 (Government Brief, pp. 59-60 n. 65) ***Thus Seatrain overlooked a provision of the original Act, created an ambiguity, and then assigned it to Congress.***

The other "ambiguity" which the Government and Seatrain have concocted (whether three-month transfers required payback) finds no support in the legislative history. Rightly or wrongly, both Chairman Kennedy and the Senate Committee appeared to have assumed that prorata payment for three-month transfer was required by the 1936 Act, but found ambiguous and confusing whether the statute allowed two types of transfer to domestic service, restricted and unrestricted.

The same Senate Report reveals the clear and unambiguous intent of the 1938 Congress in rewriting section 506:

> *"As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports en route to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period."* S.

> Rep. No. 1618, 75th Cong., 3d Sess. 13 (emphasis supplied).

In the first sentence above, the Senate Report states that prorata payment is required for incidental domestic uses. In the second sentence, the report states that temporary transfer to other than incidental domestic trade is permitted upon Commission consent for periods not exceeding six months in any year. In the third sentence, the Senate states that when such consent is given prorata repayment of CDS is required. That is the limit of the Commission's authority to allow transfer of CDS-built vessels to the domestic trade. For petitioners to argue that this rewrite of section 506 left undisturbed an authority arguably based on language appearing in the original section but purposefully removed from the rewritten section is to negate the most elementary principles of logic and statutory construction. (Pet. App. 27a-29a).[51]

[51]Petitioners (Seatrain Brief p. 47; Government Brief, p. 62) seek sustenance from the statement in the House Report accompanying the amended section 506 that "[N]o fundamental change in the original purpose of the section has been affected." (H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938). They argue that removal of the language allowing unrestricted transfer to domestic trade, which they, unlike Chairman Kennedy and the Senate, saw as clearly permitted by the 1936 Act, was such a fundamental change that the statement cannot be honored unless the Act is construed as if section 506 had not been rewritten. The flaw in this argument is that the authors of the legislation, unlike petitioners, clearly stated their uncertainty about whether the 1936 Act permitted two types of transfer to the domestic trade — one unrestricted and a second restricted to three month emergencies. With that fact in focus, and a clarification requested and granted to restrict transfer only to a limited duration, the statement in the House Report provides no support for the argument that the 1938 statute should be read as if it did not delete the language of the 1936 Act.

Moreover, what now appears "fundamental" to petitioners may not have appeared "fundamental" to the House and, indeed, may not *be* "fundamental" in view of the broad purposes which section 506 was intended to serve.

Neither Seatrain nor the Government can evade the facts that:

> (1) the section as rewritten is perfectly clear and contains no language permitting the action taken by the agency here;
>
> (2) the purpose of the legislation as clearly stated by the then chairman of the Maritime Commission was to restrict the *right* to engage in other than incidental domestic trade to one class of transfer, six months in any one year;
>
> (3) the author of the 1938 legislation characterized his bill as containing changes which were "founded on the recommendations of Chairman Kennedy and the Maritime Commission," and "written wholly in the light of suggestions which come from the Maritime Commission . . ." (82 Cong. Rec. 6471 (May 9th, 1938));
>
> (4) The language as rewritten left in only one consent which the agency could give: the consent that CDS vessels may ply the domestic trades for no more than six months in any year; and
>
> (5) The Congress in 1938 repealed the language of the original section arguably supportive of petitioners' contentions.

3. Legislative Intent of Later Congresses, If Relevant, Supports The Plain Reading of Section 506 Of The Act.

By citing various statements and actions of later Congresses primarily concerned with other statutory provisions, petitioners seek to buttress their argument that the deletion, in 1938, of the only language which could arguably authorize the actions taken by the agency in respect of the STUYVESANT somehow reveals a congressional intent to continue vesting such authority in the agency. This Court has pointed out that views of members of later Congresses concerning different sections of the statute are entitled to little, if any, weight in interpreting the earlier enacted statutory language. *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 354 n. 39 (1977); *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 199-200 (1963); *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348-349 (1963). While petitioners thus pursue an unpersuasive method of determining legislative intent, we show below that petitioners' evidence does not prove their point. Indeed, examination of actions of later Congresses shows that Congress deemed that the restrictions against domestic trading by CDS vesseis for periods of longer than six months per year could be lifted only by congressional, rather than administrative, action.

(a) *Subsequent Acts of Congress Referred To By Petitioners.*

1. The 1963 Amendments.

The Government argues (Government Brief, pp. 52-53, 63-64 & n. 67) that amendments proposed in 1963 to the Merchant Marine Act show that Congress intended that a

CDS-built vessel, upon expiration of its statutory useful life, "may operate exclusively in the domestic trade" (Government Brief, p. 53). It says that such legislation "would have expressly declared that Section 506 did not limit the trading opportunities of a subsidized ship beyond its statutory useful life . . . ." (Government Brief, p. 63 n. 67), and that it was not enacted "on the understanding that Section 506 did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized. See 109 Cong. Rec. 18752 (1963) (remarks of co-sponsor Senator Magnuson)." (Government Brief, p. 64 n. 67). Whether or not a vessel, once its statutory life has expired, is free to ply the domestic trades without restriction is, we contend, not strictly relevant to the issue of whether Congress intended transfer to the domestic trade of such a vessel during its useful life.[52] In any event, the Government representation of the 1963 amendment and of the views expressed by Congress is wrong.

The bill, S. 1172, did not, as the Government contends, "declare that section 506 did not limit the trading oppor-

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[52]The relevance of this issue is explored *infra*, pp. 101-103, in connection with our discussion of the Grace Line action which was based on a Comptroller General's Opinion which did assume that a vessel could freely transfer into the domestic trade upon expiration of its statutory life. (The Government cites the Grace Line decision, No. B-155039, 44 Comp. Gen. 180 (1964) as support for its argument on this point (Government Brief, p. 53)). The statute by its terms bars entry of a vessel into the domestic trade after expiration of its useful life because it says: "*Every* owner of a vessel . . . "which would include, obviously, owners after such expiration. Furthermore, the agency has construed the Act to prohibit unrestricted entry into the domestic trades after expiration of a vessel's statutory economic life by providing, in its standard subsidy contract, that the section 506 restrictions shall run with the title of the vessel. See discussion, *infra,* pp. 105-106.

tunities of a subsidized ship beyond its useful life. The relevant section of that bill stated:

> "Sec. 2. Section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C. § 1156) is hereby further amended so as to add the following sentence after the first sentence thereof: 'Such annual payments shall terminate at the end of the vessel's useful life for depreciation purposes as provided in section 607 of the Merchant Marine Act, 1936. Any contract between the owner and the United States which was entered into prior to the date of enactment of this Act and which would be affected if the provisions of the amendment made by this Act were applicable thereto, may, at the request of the owner be revised to be in accordance with the law as amended by this Act, with respect to such of the vessels covered thereby as may be designated by the applicant.' " S. 1172, 88th Cong., 1st Sess. (1963).

The proposed amendment does not even appear to relate to termination of payback for six month trading, as the amendment was to be inserted after the first sentence of section 506, which deals only with payback for incidental domestic trade. Thus the amendment appears to apply only to proportionate payback for such incidental domestic service, rather than to proportionate payback for six months service, which was required by the next to the last sentence of section 506.[53]

[53]That the "repayment termination" provision, if enacted, would have been applicable only to incidental domestic service, leaving unaffected the obligation to make subsidy refunds for six-month domestic service after expiry of economic life, was pointed out by the Comptroller General in letters to both the House and Senate Committees considering this proposal (which ultimately was deleted from the bill as passed by Congress). *See*, S. Rep. No. 474, 88th Cong., 1st Sess. 3-4 (1963) (letter of the Comptroller General); H. Rep. No. 1029, 88th Cong., 1st Sess. 7 (1963) (letter of the Comptroller General).

But even if the proposed amendment would have terminated proportionate payback for six month use after expiration of useful life, the Act did not "expressly declare" *anything* about the *trading opportunities* of a subsidized ship beyond its statutory useful life. It merely stated that proportionate repayment of the subsidy would no longer be required at that time. *All of the hearings and reports cited by the Government show only that the intent was to terminate proportionate payback of subsidy at the end of a vessel's useful life; nowhere is there a statement even relating to a lifting of the bar against unrestricted use of the vessel in domestic trade.*[54]

[54]For example, page 2 of the House Report, which is cited by the Government, merely indicates that "payments of *refunds* of a portion of construction subsidy for operations in the domestic trade *will be based only on the whole statutory life* of the vessel . . ."; similarly, page 5 does nothing more than state that "there would be *no more refunds* of construction subsidy for domestic operation *after that [statutory life] cycle is completed.*" H. Rep. No. 1029, 88th Cong., 1st Sess. 2, 5 (1963) (emphasis added). The Government's other citations to the legislative history of the 1963 amendments are virtually identical; none of these citations contain any language either directing or approving a lifting of the statuory prohibition against permanent participation by subsidized vessels in domestic trade. The remarks of cosponsor Senator Magnuson did *not*, as the Government says (Government Brief, p. 64 n. 67), betray an understanding that section 506 as amended "did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized." What Senator Magnuson said was:

> "Let me say further that the report language on page 3 as to the elimination of section 2 of the bill has reference to the fact that the committee understands that the formula prescribed in section 1 of the bill would by its application complete the statutory life cycle of the vessel and there would be no more refunds of construction subsidy for domestic operation after that cycle is completed." 109 Cong. Rec. 18752 (1963).

Again, there is no reference to a lifting of the bar and the Government's representations as to this unenacted bill are wholly wrong.

2. The 1970 Amendments.

The Government refers (Government Brief, p. 64 n. 67) to two congressional reports issued in 1970 relating to H.R. 15424, 91st Cong., 2d Sess.,[55] in support of its representation that later Congresses deemed trading restrictions relieved at the end of a vessel's statutory life. The citations are puzzling. The cited page of the conference report refers to amendments relating to a redefinition of the term "foreign commerce" for liquid and dry cargo carrying foreign-to-foreign services; amended authority to settle claims arising under ODS contracts; and fire provision standards for a passenger riverboat, the DELTA QUEEN. The cited page of the Senate Report refers to the agency requirements for performance bonds under the Miller Act; settlement of claims arising under ODS contracts, and the creation of a Presidential Commission on American Shipbuilding.

3. The 1972 Amendments.

Primary reliance, and for Seatrain exclusive reliance, for support of the argument that later Congresses understood that the agency possessed inherent power to authorize unlimited operation in the domestic trades is placed on the 1972 amendments to the Merchant Marine Act.[56] These amendments occurred after the agency had once exercised this power, in 1964, in respect of two "Grace Line" vessels built without subsidy but reconstructed for foreign commerce with subsidy, and thereby barred from permanent operation in the domestic trades after reconstruction.[57]

[55]H.R. Conf. Rep. No. 1555, 91st Cong., 2d Sess. (1970); S. Rep. No. 1080, 91st Cong., 2d Sess. (1970).

[56]Pub. L. No. 92-507, 86 Stat. 909 (1972).

[57]The Grace Line action, its reasoning and precedential value, are discussed *infra*, pp. 101-103. In connection with the alleged

Congressional discussion of the Grace Line action arose in connection with an amendment proposed in 1972 to section 1104(a)(3) of the Act. Section 1104(a)(3) does not deal with CDS at all; it is part of Title XI which provides for a different form of aid to the U.S. shipbuilding industry, namely government guarantees of privately-made loans which finance shipbuilding in U.S. yards. Section 1104(a)(3), added in 1972, extended the Government's authority to make guarantees of loans incurred to aid in: "financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter [Title] V of this chapter [Act]." 46 U.S.C. § 1274(a)(3).

Petitioners argument is based *not* on the language of 1104(a)(3), which allows the agency to extend guarantees for repayment of subsidy — and such repayment is specifically contemplated under section 506 in respect of incidental domestic commerce and six month per year use in domestic trade — but at language *proposed* in 1104(a)(3) which was not enacted. That language would have given the congressional seal of approval to the Grace Line action. Once again petitioners argue that congressional omission of language which would have authorized the agency actions taken here shows a congressional purpose to authorize such actions.

The proposed section 1104(a)(3), which was *not* enacted, would have permitted the Secretary to guarantee

"understandings" of later Congresses, however, that action forms the predicate for petitioners' argument that the 1972 Congress interpreted the Secretary's power as do petitioners here. (Seatrain Brief, pp. 61-66; Government Brief, pp. 67-69).

an obligation which aids in:

> "financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, *in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessels from such restrictions;* . . ."[58]

It is the words in italics that were omitted from the bill as enacted.[59]

Petitioners argue that the omission of the language which would authorize the actions taken here proves the congressional intent to permit those actions because the reasons given for that omission demonstrate a congressional purpose to approve the Grace Line action. They derive that tortured result from the House Report which refers to the Grace Line case and determines not to deal legislatively with that issue. The House Report, after reciting the terms of the bill as proposed, explained its reasons for deleting this legislative approval of the Grace Line action as follows:

> "In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special

[58]H.R. 9756, 92d Cong., 1st Sess. (1971) (emphasis supplied).

[59]Interestingly, the standard to be applied in lifting the bar, consideration of competitive effects, was the standard legislated by the district court for compliance with the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). (Pet. App. 90a-94a).

> circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assitance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act."[60]

The court below characterized the petitioners' argument of reliance on the legislative history of 1104(a)(3) as "singularly convoluted" (Pet. App 46a). The court painstakingly dissected the argument and rejected it for four reasons (Pet. App. 47a-48a). First, the court said that insofar as the House Report was concerned, the House Committee defined the Grace Line action as "a very special circumstanc[e]" and an "unusual situation" and specifically declined to commit itself on the issue. Second, the language of 1104(a)(3) refers only to subsidy repayments *permitted* under Title V, and the only subsidy repayments so permitted are in section 506 which petitioners concede does not authorize a permanent waiver for CDS-built vessels into the domestic trade. Third, both the House and the Senate specified that their amendment "does not in any way extend or affect the application of Title V of the Act." Such a specific disclaimer can hardly be used as an argument that the construction now to be given to Title V should rely to any degree upon this amendment. Fourth, the court said that nothing contained

[60]H. R. Rep. No. 688, 92d Cong., 1st Sess. 10 (1971).

in the legislative history of *Senate* approval even refers to approval of the Grace Line action or an authorization for additional waivers of domestic trade restrictions.[61] Each of these reasons is sufficient to decline petitioners invitation to find authority for the agency's actions in the language explaining the non-enactment by a later Congress of an amendment to a section of the Act dealing with a different form of Government aid. We submit that together, the court of appeals' reasons are compelling.

4. The 1978 Amendments.

In citing to the 1978 amendments, once again the Government, but not Seatrain, seeks shreds of support from irrelevant acts of later Congresses. The 1978 amendment (Government Brief, p. 70) was a one-sentence act intended to allow vessels serving the U.S. Great Lakes trades to qualify for 87-1/2 percent government-guaranteed financing under Title XI of the Act despite the fact that such vessels might not meet a minimum 14 knot speed[62]

[61]Petitioners' recital of the legislative history of the 1972 amendments omits any reference to the other half of the Congress which passed the law. Nothing in the legislative history relating to Senate approval of the amendment, however tortuously construed, could possibly support petitioners' argument that by omitting the proposed language, the Senate adopted the principle reflected therein. The Senate Committee reported as follows on the bill as passed by the House:

> "Paragraph (3) is new. This paragraph would permit the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." S. Rep. No. 1137, 92d Cong., 2d Sess. 9 (1972).

[62]The amendment provided, in full, "[t]hat section 509 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1159), is amended by striking the words 'fourteen knots' in the fourth sentence, and inserting in lieu thereof the words 'ten knots.' " Pub. L. No. 95-505, 92 Stat. 1755 (1978).

which was previously one prerequisite to such financing. Under Title XI of the Act, the Government may guarantee loans for 75 percent of the cost of construction or reconstruction of vessels built with CDS, but 87-1/2 percent for vessels built in U.S. yards without CDS. In order to qualify for 87-1/2 percent financing, however, a vessel was required to meet the minimum speed set forth in section 509 of the Act. Prior to 1978, that speed was 14 knots. The 1978 amendment lowered it to 10 knots so that the vessels in Great Lakes trades might qualify because the optimum speed for such vessels was 10 knots.[63] The amendment thus put vessels serving the Great Lakes trades on a par with other unsubsidized vessels in qualifying for 87-1/2 percent government-guaranteed financing.[64]

[63]H. R. Rep. No. 1528, 95th Cong., 2d Sess. 1 (1978).

[64]The quotation in the Government brief (Government Brief, p. 70) of a Department of Commerce representation contained in the House Report to the effect that vessels affected by the amendment would include Great Lakes vessels on which subsidy has been repaid shows only that the Department of Commerce took the position, in 1978, that vessels built for foreign trades could repay their subsidy and be cleansed. Since that has been the Department of Commerce interpretation since it attempted to waive the bar for the STUYVESANT in 1977, it is hardly "legislative history" for the Department to take that position in 1978. It would be more instructive if the Department took a different position with Congress than it has before the courts (*see e.g. infra,* pp. 85-87). To argue that the statement in the House Report representing the position of the Department of Commerce represented a *sub silencio* agreement with that position, in a context in which Congress' attention was focused only on reducing a speed requirement to establish parity for Great Lakes vessels with other domestic vessels, is only to betray the tenuousness of the Government claim that acts of later Congresses support its position here. (*See Sloan, supra,* 436 U.S. 103, 120).

(b) *Subsequent Acts of Congress Not Referred To By Petitioners.*

By unpersuasive citations to unenacted or irrelevant amendments, petitioners have attempted to show that later Congresses interpreted the Act to permit the Secretary to create new exceptions to the bar against domestic trading by CDS vessels other than those contained in section 506. But petitioners wholly ignore the acts of later Congresses, including legislation now pending, which show the understanding of those Congresses that such exceptions must be created only by the legislative, not the executive branch of the government.

1. The Relief Act of 1940.

The Relief Act, 46 U.S.C. 1242(a), was enacted on June 29, 1940 because the operation of vessels in certain foreign trades was suspended as a result of the Neutrality Act of 1939, 22 U.S.C. § 441 *et seq.* In view of the impending national emergency, those vessels were useful in domestic trade. But in order for the vessels to be used in domestic trade the CDS contracts would have to be amended or suspended. Congress specifically gave the agency that authority in subsection (c) of that Act.[65]

2. The Merchant Ship Sales Act of 1946.

This act, 50 U.S.C. App. 1735 *et seq, repealed,* Pub. L. No. 94-412, 90 Stat. 1258 (1976), similarly contained a provision specifically making section 506 inapplicable to a certain class of war-related vessels. Section 9(d) of that act, 50 U.S.C. App. 1742(d), stated:

[65]The text of subsection (c), the background of the legislation, and the fact that the legislation provided relief from section 506 requirements, are all contained in an agency legal opinion dated December 17, 1952 (A. 424-433).

> "Section 506 of the Merchant Marine Act, 1936 as amended. . . shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clauses (1)-(3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945, and prior to the date of enactment of this Act."

3. Pending Legislation.

On July 12, 1979, Congressmen Murphy, McCloskey and Snyder submitted H.R. 4769 for consideration by the House of Representatives.[66] This massive piece of legislation, referred to as the "Omnibus Maritime Bill," proposes exhaustive revisions involving the entire body of existing maritime legislation, including extensive proposed revisions to the Merchant Marine Act, 1936. A number of these proposals, if implemented, would bring about fundamental changes in the present workings and underlying policies of the Act. Among these changes would be the amendment of Section 506 of Title V of the Act to remove the present prohibition against permanent participation in the U.S. domestic trade by a vessel built with CDS funds if the unamortized portion of the subsidy is repaid.[67]

[66]H. R. 4769, 96th Cong., 1st Sess. (1979).

[67]The proposed amendment to section 506 would read:

> "The owner of a vessel for which construction-differential subsidy has been paid shall agree that the vessel will be operated in international trade or the foreign commerce of the United States; except that the Secretary may consent in writing to the transfer of any vessel, for which construction-differential subsidy has been paid, to the domestic trade if the Secretary determines that such transfer is necessary or appropriate to carry out the purposes of this Act. If a vessel built with construction-differential subsidy is operated in the domestic trade, the owner of the vessel shall pay annually to the Secretary of

Whether or not section 506 will be amended as is currently proposed remains to be seen. That the bar against lifting permanent trade restrictions now *exists* in section 506, and that questions of removing that bar involve serious considerations relating to protection for the Jones Act fleet, however, were recognized by no less an authority than the Assistant Secretary for Maritime Affairs of the Department of Commerce, who testified:

> "In another area, we support, with important reservations, the Bill's proposal to amend Section 506 and 605(a) of the Act to simplify the conditions under which vessels built with CDS and operated with ODS would be permitted, with pro rata payback of construction subsidy, and abatement of operating subsidy, to participate in the U.S. domestic trade. The proposed Section 506 amendment would *eliminate the existing six month per year limit on participation* by CDS-built ships in the Jones Act trade and the Section 605(a) amendment would broaden the conditions under which ODS ships might participate.
>
> * * *
>
> "Mr. Chairman, the owners of Jones Act ships, who have undertaken significant investment risk to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships built for the foreign trade with the advantage of construction subsidy. We believe the Bill should explicitly

Commerce that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year." H. R. 4769, *supra*, Sec. 302(6).

> acknowledge the interests of the domestic operators and that it should contemplate the adoption of equitable regulations to govern the conditions under which subsidized ships might be permitted to enter the domestic trades."[68]

The proposed changes in the Omnibus bill now pending show a congressional recognition that section 506 would require revision in order to allow the very agency actions defended here. The testimony of the Assistant Secretary shows that such revisions ought be addressed in the context of a thorough consideration, *by Congress,* of the implications of permitting subsidized vessels into Jones Act trades on a permanent basis.

C. Sections Other Than Section 506 Do Not Supply The Authority Not Conferred By Section 506.

Arguing that section 506 is "neutral" on the issue of whether the agency may lift the bar against use in domestic trades of a vessel built with CDS where the owner pays or promises to pay back the subsidy, petitioners must still find *some* authority conferred by the Act authorizing the Secretary to give funds for the purpose of building a ship for U.S. foreign commerce, whereupon the ban is automatically imposed, and then lift the ban upon repayment, or promise of repayment, of those funds. The authority is said to reside in the Secretary's "broad contractual powers" as evidenced by sections 207 (46 U.S.C. § 1117) and 504 (46 U.S.C. § 1154) of the Act. The citations to these sections as source for the authority betrays

[68]Statement of Samuel B. Nemirow, Assistant Secretary for Maritime Affairs, Before the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, on Titles III, IV and V of H R. 4769, pp. 28-29 (September 5, 1979) (footnotes omitted and emphasis supplied).

only the weakness of petitioners' claim that the authority exists were section 506 as irrelevant as claimed.

Section 207 states, in pertinent part:

> "The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."[69]

The Government argues (Government Brief, pp. 50-51) that the waiver granted here was made for the express statutory purposes, protection and improvement of collateral. Yet both the Government and Seatrain ignore the phrase that gives meaning and definition to the authority conferred by section 207: the actions authorized to be taken for the purposes specified are co-extensive with actions that might be taken by a "private corporation . . . within the scope of the authority conferred by its charter." Section 207 authorizes the Secretary to exercise those powers ordinarily exercised by private companies. Private companies do not exercise governmental powers, and the waiving of a restriction imposed by statute is the exercise of a governmental, not a private power. The

[69]In quoting this section, Seatrain omits the critical language "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." (Seatrain Brief, p. 21).

statute says that the Secretary's authority under section 207 to protect/preserve/improve collateral may be accomplished by entering into contracts and making disbursements in the same manner as would a private corporation. There is no suggestion that the purpose of protecting/preserving/improving collateral may be accomplished by regulatory action.

Moreover, the Government's suggestion (Government Brief, p. 63) that the simultaneous amendments to sections 506 and 207 of the Merchant Marine Act accomplished by Congress in 1938[70] show a consistent purpose to expand the waiver authority of the Secretary is refuted by the legislative history of the 1938 amendment to section 207. The Senate Report on the 1938 amendments noted that section 207, as enacted in 1936, originally provided:

> "the Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." S. Rep. No. 1618, 75th Cong., 3d Sess. 4 (1938).

The 1938 amendment added a specific authorization to make disbursements, and added an alternative purpose to both the contracting and disbursement authority, namely the purpose to protect/preserve/improve collateral held by the Commission to secure indebtedness. The Senate Report which explained the purpose of the amendments stated:

> "It is believed that such authority already exists in the Commission, but the amendment is recom-

[70]For a discussion of the 1938 amendments to section 506, see *supra*, pp. 61-73.

mended in order to remove any doubt that the Commission possesses the power to advance or expend funds for such purposes where found necessary. Other Government lending agencies, such as the Reconstruction Finance Corporation, have such authority." *Id.* at 5.

Similarly, the House Report stated:

"The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority the Commission may find it impossible to protect its mortgage or other interest in vessels, the title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation." H. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

The explanation in the House Report of the amendment to section 207 was taken almost verbatim from the statement which Chairman Joseph Kennedy made on December 2, 1937 during the House hearings (House Hearings on the 1938 Amendments, *supra,* at 4-5). Kennedy's remarks are consistent with the explanatory note to the amended version of section 207 which appears in the Senate Committee print of the Administration bill introduced by Senator Copeland on December 2, 1937:

"EXPLANATION – Section 207 grants to the Commission broad powers in conection with the administration of its affairs, powers which are as extensive as those possessed by the ordinary Government or private lending institution. *However, the broad grant of power, without specific particularization, may raise certain doubts as to the scope of the general grant. To remove such doubts and to simplify administration, these clarifying amendments are suggested.* The amendments are intended to be indicative rather than inclusive. *They do not grant new powers, but merely clarify and restate, in part only, those now existing.*

The specific reference to the power of preserving collateral is intended to assure the Commission that it possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies such as the R.F.C. Without such powers the Commission may find it impossible to protect its mortgage or other interests in vessels operated by financially embarrassed companies where such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation." S. [unnumbered] 75th Cong., 2d Sess. (Committee Print of December 2, 1937) (emphasis added). (This committee print was later introduced as S.3078).

Further explanation of the purposes of section 207 as confirming the Secretary's power to contract and make disbursements in order to protect collateral in the same manner as does a private corporation is found in an exten-

sive dialogue between members of the Senate Commerce Committee and Chairman Kennedy, along with his General Counsel Max O'Rell Truitt, wherein Mr. Kennedy explained that in order to protect the Government's collateral, tied up in vessels whose owners were in bankruptcy or receivership, the agency needed to keep the vessels operating in order to protect its financial position.[71]

Both a literal reading of section 207 and an examination into its legislative history make clear that that section does not speak to any governmental powers that the Commission may have.[72] It was for that reason that the court below

[71]Proposed Amendments To Merchant Marine Act, 1936: Hearings on S. 3078, 75th Cong., 3d Sess. 1157-1158 (1938).

Both Mr. Kennedy and Mr. Truit explained that the only purpose of this amendment confirming the power to make disbursements and confirming that contractual and disbursement power could be exercised to protect collateral to secure indebtedness was to enable the Commission to operate as does a private corporation which forecloses on property. As stated by Mr. Kennedy:

> "So, while we were foreclosing the property, and had that as collateral, we would like then to be able to go onto those ships and comply with the requirements of the Department under the law and maintain them and run them. That was the only real purpose in having that in here."

And as stated by Mr. Truitt:

> "We think that under the present statute we have the right do those things, but we are sure that if we did them we would be seriously questioned by the Comptroller General. To remove that possibility and to give us a clear right to protect the property on which we have a mortgage, so that we can run it during the period of foreclosure, *we think this language ought to be put in to enable us to make such disbursements to protect ourselves or to improve the collateral held by the Commission.*" Hearings on S. 3078, *supra,* at 1157-1158 (emphasis added).

[72]Similarly, in the only judicial decision speaking to the Commission's powers under section 207, Dollar v. Land, 82 F. Supp. 919 (D.D.C. 1948), *rev'd.*, 184 F.2d 245 (D.C. Cir. 1950), *cert. denied*, 344

correctly found that section 207 is "what is commonly called a 'housekeeping statute,' and a similar provision is found in nearly every administrative agency basic statute" (Pet. App. 41-a-42a) and concluded that: "§ 207 cannot be a foundation of Agency power . . . to exercise any power not otherwise granted in the Act or other statute." (Pet. App. 43a).[73]

Petitioners' only other statutory source of authority to change mind, mid-stream, about the trades in which vessels built with CDS may be employed, aside from general references to "broad contractual powers" and the inferences that may be drawn therefrom, [74] is Seatrain's reference to section 504 of the Act and specifically the language in section 504 which provides that the contracts reflecting the transaction "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. § 1154. Seatrain argues that the subsidy contract therefore can not restrict the vessel's permanent operation in domestic trades after subsidy is repaid.

U.S. 806 (1952), that section was interpreted as relating only to the agency's authority to operate as a private corporation, not to its governmental authority.

[73]In petitioners' original attempt to secure the necessary governmental authorization for its three-year charter of the STUYVESANT to Sohio, filed under the regulations implementing section 506, *see supra,* pp. 13-14, petitioners relied upon section 207 as overriding the restrictions of 506, which latter section it admitted conflicted with its interpretation of section 207 (Pet. App. 10a n. 17). The agency's lack of confidence that the broad powers of section 207 would override the explicit commands of section 506 is shown by its failure to approve that application, opting for the "waiver upon promise to repay CDS" route, accomplished even before any notice was given that the proceeding instituted in response to this three-year application was terminated.

[74]The Government brief, while reiterating the "broad contractual powers" theme, cites only to section 207 as the statute conferring Secretarial power to waive the 506 restriction upon use in domestic

Congress rejected Seatrain's reading of section 504 by explaining that this last sentence of section 504, added by amendment in 1951, was intended to restrict the operation of CDS-built vessels *specifically to those trades permitted by section 506*. Congress said, in both the House and Senate Committee Reports:

> " '*Subject to the exceptions contained in section 506 of the 1936 act as to use in domestic trades,* sections 1 and 4 [of the amendments] . . . provide that the lawful or proper use of a vessel constructed with . . . [construction-differential subsidy] may not be restricted.' " S. Rep. No. 295, 82d Cong., 1st Sess. 4 (1951); H. R. Rep. No. 2221, 82d Cong., 2d Sess. 25 (1952), quoted in the opinion below (Pet. App. 40a n. 102) (court's emphasis).

Thus Congress did not think section 506 neutral, as do petitioners, on the issue of what contractual rights the Secretary must insist upon in contracts with CDS recipients.

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trade. (Government Brief, pp. 50-51, 63, 73) The Government additionally cites to judicial authorities for the proposition that the power to contract includes the power to rescind or amend contracts, but then concedes that such lesser powers are subject to congressional limitation (Government Brief, p. 49). Such general propositions do not further analysis here, because clearly if the amendment of a contract results in a new arrangement which the Secretary would not have had *power* to make in the first place, authority cannot be self-generated under the "power to amend" concept. Since the Government registers considerable doubt, p. 54 & n. 60, as to whether the Secretary could pay CDS for the construction of a vessel for foreign trade, with the understanding that the recipient could pay back the subsidy and employ the ship in domestic trade, the Government's argument that the power to grant subsidy necessarily subsumes the power to take it back is contradictory.

Congress plainly addressed, in section 506, the issue of permissible use for vessels built with CDS for the purpose of serving the *foreign* commerce of the United States. No other sections detract from that congressional delineation of those uses or add additional permissible uses.

D. No Deference Is Due To The Interpretation Of The Act Made By The Secretary With Respect to Waiving The Bar For The STUYVESANT.

1. To Qualify For Judicial Deference, Administrative Interpretations Must Satisfy Threshold Requirements.

Petitioners support their request for judicial deference to the agency's interpretation of its powers by contending that such interpretation was both longstanding and consistent.[75] While we show below that the interpretation was neither, this Court has plainly taught that even compliance with that standard will not convince the judiciary to recede from its role of being the final arbiter of the limits of administrative power.[76] As this Court stated in *FMC* v.

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[75] Government Brief, pp. 64-66; Seatrain Brief, pp. 50-51.

[76] That administrative interpretations are not conclusive or binding upon the courts, but constitute only "one input in the interpretational equation" Zuber v. Allen, 396 U.S. 168, 192 (1969), which the courts execute in their role as the "final authorities on issues of stautory construction" FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) is clear. In carrying out that function, the reviewing courts:

> " 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291 [1965]." Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968).

See also SEC v. Sloan, 436 U.S. 103, *supra*, 110-114; Morton v. Ruiz, 415 U.S. 199, 237 (1974); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); Zuber v. Allen, *supra*, 396 U.S. at 193.

Seatrain Lines, Inc., 411 U.S. 726, 745 (1973) ". . . an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."

Moreover, the threshold requirements of continuity and consistency are not sufficient to obtain the deference which petitioners so earnestly seek (and need) in this case. The degree of deference accorded to administrative interpretations:

> "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The importance of a thorough administrative consideration of agency powers, prior to attempting their exercise, was explained in *SEC* v. *Sloan, supra,* 436 U.S. 103, wherein this Court, having been urged to pay deference to an agency interpretation, pointed out that the agency had not "actually addressed in any detail the statutory authorization under which it acted" and that the agency's action "without a concomitant exegesis of the statutory authority for doing so, obviously lacks 'power to persuade' as to the existence of such authority." 436 U.S. at 118, citing *Adamo Wrecking Co.* v. *United States,* 434 U.S. 275, 287-288 n. 5 (1978).

The importance of the element of contemporaneity with respect to the quantum of deference to be paid has also been stressed by this Court. As stated by Justice Harlan in *Zuber* v. *Allen, supra*, 396 U.S. at 192, an administrative construction:

> "carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. . . In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation." (Citations omitted).

Relying on *Zuber*, the Court in *Sloan, supra*, rejected the agency's urgings that its interpretation of the statute was contemporaneous in nature and therefore entitled to judicial deference.[77]

This case is a classic illustration of the need for judicial scrutiny of the bounds of authority conferred by Congress on administrative agencies. The agency meets none of the standards required for deference. As to careful consideration and articulation of the source of the claimed powers, the agency here issued *no,* much less a well-reasoned, interpretation of the Act, but merely collected those rationalizations available to support its interpretation when confronted with a judicial challenge. As to con-

[77] In *Sloan,* the Court said:

> "Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12(k) to the Congress which drafted the 'enabling legislation' here in question – the Securities Exchange Act of 1934. They made known to at least one committee their subsequent construction of that section 29 years later, at a time when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court." 436 U.S. at 120.

The circumstances of the *Sloan* case are virtually identical to this case and its reasoning directly on point.

temporaneity, the agency and its predecessor agencies did not issue any interpretation of the Act which would support petitioners' position here until over 25 years after section 506 was enacted in its present form. As to consistency, the interpretation rendered for the Grace Line vessels is inconsistent with the agency interpretation offered in this case; the other agency actions urged to show consistency all were taken within two years prior to this litigation, all are conditional and none comparable; no agency regulations support its present interpretation, and current regulations are inconsistent with that interpretation; moreover, contractual implementation of the CDS program is inconsistent with that interpretation.

A study of the agency record shows that the statutory interpretation urged here was adopted to secure one result in 1977: protection of government funds at risk because of governmental decisions to extend financial aid to a private operator for a venture that was not going to be, and perhaps never could have been, successful. Judicial intervention, not deference, is required here to keep an agency within the bounds of its legislative mandate which bad governmental judgments have tempted it to exceed.

2. The Agency's Interpretation Of Its Powers Was Wholly Opportunistic; It Was Not Even Stated, Much Less Well-Reasoned Or Articulated.

The agency has continuously sought to bend the rules for the Seatrain endeavor (*supra,* pp. 3-15). When Seatrain first sought to accomplish the three-year charter to Sohio, it did so not by "re-tendering" the subsidy monies, but by requesting permission for that charter *under* section 506 of the Act. That application, filed July 8, 1977 (A. 18-33), was docketed by the agency as an application filed under Part 250 of its regulations which established specific procedures for entry of subsidized vessels into the Alaskan oil trade. But these very regulations *prohibited* the approval of an application which would result in longer participation than six months in any consecutive 12-month period. Instead of rejecting this application out-of-hand, it was docketed by the agency under Part 250 (Maritime Administration Docket S-565), noticed in the *Federal Register,* and comments were invited (Pet. App. 70a). The barrage of protests against the apparently intended blatant violation of section 506 resulted in the arrangement under review here, announced by a Press Release (A. 77-78) and accomplished by two letters dated August 31, 1977 from the agency to petitioners (A. 66-76).

The first of these letters sets forth the reasons for the agency's interpretation that its statutory powers permit it to authorize permanent domestic trading for the CDS-built STUYVESANT. The letter begins:

> "For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states." (A. 66).

The letter then refers to the substantial Government assistance rendered by the agency's sister agency, the Economic Development Agency, and states that "several years of work and negotiations have generated no other opportunities for employment of this vessel" (*Id.*). The reasons given for exercise of the claimed waiver power, *in full,* are:

> "[The agency is] persuaded that approval of the proposed CDS repayment and the time charter of

> the Sohio Petroleum Company will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation, ..." (A. 66).

This statement contains *no* interpretation, *no* reasoned analysis. None of the *post hoc* rationalizations offered to this Court, *e.g.*, the alleged interplay between sections 506 and other sections of the Act, the intentions of the Congress that passed section 506, of predecessor and later congresses, of legislative intent behind the non-enactment of legislation – nothing is said about *the statute.* The two reasons given on August 31, 1977 remain the real reasons for the agency's actions: protection of both petitioners' and the Government's financial position. Such reasons do not constitute the kind of thoughtful, well-reasoned interpretation of a statute to which this Court must pay deference in seeking to determine congressional intent.

3. The Agency Interpretation Of Its Powers Was Not Contemporaneous.

Petitioners concede (Government Brief, p. 65; Seatrain Brief, p. 51) that the first exercise of this asserted power was in 1964, some 26 years after section 506 was rewritten in the terms in which it stands today.[78] The *first* official interpretation of the power claimed here appeared in a Notice of Proposed Rulemaking issued *October 25, 1978,* 43 Fed. Reg. 51045 (November 2, 1978) which purported to establish regulations governing the conditions upon which the agency would waive the restrictions against permanent operation of vessels built with CDS. Those regulations were issued in response to the decision of the District Court here which, although sanctioning the waiver for the STUYVESANT, demonstrated concern that the agency had issued no regulations to guide the public in regard to the exercise of the claimed powers.[79] These proposed regulations have been neither promulgated nor withdrawn, the agency apparently awaiting final disposition of this case.

[78]The Commission first addressed the problem of CDS repayment in 1942 by issuance of its General Order 50, 46 C.F.R. § 276 (1944 Cumulative Supplement to the 1938 Code of Federal Regulations, pp. 11229-11230). These regulations prescribe the time for repayment of CDS for any CDS-built vessel "operated in other than exclusive foreign trade," and contained reporting requirements as well. No provision is made for repayment of unamortized subsidy as "consideration" for lifting a statutory bar.

4. The Agency Interpretation Of Its Power Was Not Consistent.

Since 1936, when the CDS program was instituted, there has been only one instance, other than the instant case, in which the agency accepted repayment of subsidy in order to permit vessels to operate in domestic trade.

[79]Pet. App. 88a-89a. The district court held that the Secretary's failure to publish regulations did not violate 5 U.S.C. 552(a)(1) as interpreted by this Court in Morton v. Ruiz, 415 U.S. 199 (1974). The lower court characterized that decision as employing "some extraordinary far-reaching language" (Pet. App. 87a) but nevertheless stated that:

> ". . . the Secretary should, as a matter of sound policy, establish guidelines and procedures of general applicability to govern CDS repayment and permanent waivers of domestic trading restrictions. The Court is unpersuaded that there is any compelling reason for the Secretary to make determinations on applications such as that concerning the STUYVESANT on an *ad hoc* basis . . . The Court is confident that the Secretary will give these concerns regarding the need for appropriate regulations her most serious consideration."*Id.* at 89a.

This was in 1964 when Grace Line asked the agency to amend its CDS contracts with respect to the SS SANTA ELIANA and the SS SANTA LEONOR to release the vessels to operate in domestic trades. Although these vessels had been built in U.S. yards without subsidy and had therefore initially qualified for the Jones Act trades, they had been reconverted with the aid of CDS so that section 506 prohibitions were later attached. So far as is known, the request was unopposed; nevertheless, the agency, on its own, asked the Comptroller General for an opinion as to whether it had the authority to waive *the restrictions of section 506,* enclosing an agency General Counsel's Memorandum Opinion which purported to analyze the statute and to find authority therein for the requested waiver. The Comptroller General issued an opinion which tracks *almost word for word* the General Counsel's Memorandum. *Compare* Opinion of the Comptroller General, B-155039, 44 Comp. Gen. 180 (September 30, 1964) (A. 172-180) with Maritime Administration Acting General Counsel's Memorandum (A. 350-358).

In discussing the "deference" that should be paid to the single administrative interpretation of the agency powers, issued 26 years after the enactment of the statute, the Court below stressed that the action taken for the Grace Line vessels was unopposed, not judicially tested, not binding on the judiciary, and most importantly, inconsistent with the statutory interpretation issued here (Pet. App. 31a-32a). In 1964, the agency sought confirmation of its asserted authority to waive the restrictions of section 506 (A. 172), whereas petitioners here urge that section 506 is not a bar. The Comptroller General's Opinion (which in reality was nothing more than a restatement of the agency General Counsel's Opinion) obliged, reasoning that authority to accept total CDS payback as a *quid pro quo* for release of the statutory bar stemmed from the

agency's powers as contained *in section 506.* That interpretation was reached as follows: (1) by assuming that a temporary use of the vessel after 25 years would not require any proportionate payback of subsidy; (2) by then assuming that the vessel was free to ply the domestic trades after 25 years; and (3) by then concluding that the 25 year period could be shortened by repayment of the unamortized amount of the subsidy. Thus the interpretation was expressly based on the agency's power under section 506. As the Court below noted, the agency interpretation here is directly contrary to the interpretation originally offered to support the Grace Line action: here the agency finds it best argument to be that section 506 does not preclude the actions taken, and the power is found in its general contractual authorization; for Grace Line the agency said that section 506 authorized a foreshortening of the bar.[80]

Three other instances of alleged waiver were cited by pertitioners (Government Brief, p. 66; Seatrain Brief, pp.

[80]It is understandable why the agency has decided to find reasons other than those urged in the Comptroller General's Opinion on the Grace Line vessels (and urged by the agency in its request for that opinion) to support the argument that it possesses the challenged power. The Act is silent as to whether proportionate payback is required at the end of a vessel's useful life when engaging in temporary domestic trade; the legislative history of the non-enacted 1963 amendment can be read as supporting the interpretation that proportionate payment requirements cease only for incidental domestic trading, not temporary domestic trading, when the statutory life expires. *See supra,* pp. 75-77 & n. 53. But even if the obligation to repay part of the subsidy when engaging in temporary trading does cease after 25 years, the conclusion that the bar against unrestricted domestic trading is automatically lifted is contrary to the language of the statute, *see supra,* p. 52, and is contradicted by the standard contract the agency offers to CDS operators, *see infra,* pp. 105-106. Finally, even if the words of the statute commanding obedience in perpetuity were judicially narrowed to a useful life period, there would be *no* reason to imply that the bar *during* that useful life could be waived.

54-55) in an effort to support the adjectives "longstanding" and "consistent." Since all three actions were taken within the period December 1976-August 1977 (A. 165), the "longstanding" tag hardly applies. Nor were these actions "consistent" in terms of lifting the bar against permanent domestic trading for CDS-built vessels. In the first two cases, the agency purported to permit CDS repayment "in the event that the Virgin Islands trade became domestic trade at some future date" (A. 165).[81] Thus no repayment has been either tendered or accepted. Such tender and acceptance is a condition of a contract which will come into play, *if at all,* only upon the enactment of a statute which is not on the books. As noted by the Court below, the purported waivers for these vessels were "conditional," "restricted," "as yet unexercised," and therefore not an instance of agency action waiving the bar.[82] The other "instance" of waiver was also conditional, unexercised, and not analogous to the waiver involved here (Pet. App. 35a). The waiver was to permit two liquid natural gas vessels to trade in foreign-to-foreign commerce (A. 165) which is included within the definition of foreign trade in section 506 in respect of such vessels.[83] The only

[81]The purported waiver specifically barred these vessels from entering the Alaskan oil trade (A. 165).

[82]Pet. App. 34a-35a & n. 82. The Court below characterized these conditional waivers as "an end-run around the domestic use proscriptions of § 506 . . . even under the anomolous and potentially variable circumstances of the Virgin Islands trade" (*Id.* at n. 82).

[83]Section 905(a) of the Act defines foreign trade as between U.S. and foreign countries except, "in the context of Title V of this Act concerning construction-differential subsidy," foreign trade includes, for "liquid and dry bulk cargo carrying services," foreign-to-foreign trade in such instances as the Secretary may by regulation permit. 46 U.S.C. 1244(a). The text of section 905(a) is set forth in the appendix to this brief. Thus the Secretary may grant CDS for foreign-to-foreign tanker vessels and there is no section 506 bar.

administrative interpretation of the Act rendered by the agency as a purported exercise of the alleged waiver authority, other than this case, is the waiver granted in 1964 for the Grace Line vessels based upon a statutory interpretation rejected by petitioners here.

Events on the regulatory side of the administrative ledger betray still further inconsistencies. The agency was cognizant of the fact that the development of the Alaskan oil fields might require additional U.S. flag tonnage and consequently issued specific guidelines for filing applications for serving that specific trade with CDS-built ships. Those regulations, 46 C.F.R. Part 250, state that

> "the Assistant Secretary shall not approve an application where the result would be to allow a vessel of the applicant to participate in the trade for a period exceeding six months in any consecutive 12-month period, commencing with the entry date of the applicant's vessel for the carriage of Alaskan oil in the Alaska-Panama Canal trade." 46 C.F.R. § 250.5.

Further, the agency's exercise of its *contractual* powers is totally inconsistent with the interpretation needed to waive the STUYVESANT into the domestic trades. The standard subsidy contract tendered by the agency (and the one executed as between the agency and Seatrain) provides, in Article 9B, that "Purchaser hereby agrees, in accordance with section 506 of the Act, that the Vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on . . . [incidental domestic commerce], and that if the Vessel is operated in . . . [incidental domestic trade], Purchaser will pay annually . . . [proportionate subsidy repayment]; and (ii) Purchaser agrees to comply in all other respects with section 506 of the Act."

(A. 497-498). Subsection D of the same article provides: "*The foregoing provisions of this Article shall run with the title to the Vessel and be binding on all owners thereof.*" (A. 498) (emphasis supplied). These contractual provisions show that the agency consistently, *and in this case,* deemed the section 506 restrictions to be *permanent.* They show further that the agency did *not* think such restrictions expired with the statutory useful life of the vessel (which was the predicate for its action in the Grace Line matter and for the argument urged here that the restrictions of section 506 are dependent only upon the continued retention by the purchaser of CDS).

Finally, the memorandum cited *supra,* pp. 9-10, from the Chief of the Office of Subsidy Administration to the Maritime Administrator showed that the Chief of the Subsidy division vigorously rejected the contention that the agency needed the "flexibility" to waive vessels built with subsidy into the Jones Act fleet; that official asserted that such a waiver was barred by section 506.

The request by petitioners for judicial deference to agency interpretation in this case would make a mockery of the doctrine designed to keep a proper balance between these two governmental branches. Indeed, the role of the judiciary in a case where an agency seeks to achieve a result designed to protect *its* position, rather than impartially implement congressional objectives, is quite other than deferential:

> "[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co.* v. *NLRB,* 380 U.S. 300, 318 (1965).

III. THE WAIVER FOR THE STUYVESANT WAS ALSO INVALID AS AN UNAUTHORIZED LOAN FROM THE UNITED STATES GOVERNMENT TO A PRIVATE PARTY.

Petitioners speak throughout their briefs as if the $27.2 million of subsidy paid for the STUYVESANT "has been repaid."[84] The facts are, however, that the application submitted by petitioners and accepted by the agency was not to repay the subsidy but to execute "a 20-year promissory note payable in 40 semiannual installments as reimbursement of the amount of the subsidy and other monies advanced by the Government." (Pet. App. 11a). We argued to the courts below that even assuming, *arguendo,* the statute permitted waiver of the section 506 restrictions upon repayment of subsidy, a promise to repay did not trigger the implied authority. The district court rejected that argument, stating: ". . . it would be patently inconsistent with the far-reaching nature of the Act's statutory scheme to interpret the Secretary's authority in an unnecessarily restrictive manner, ..." (Pet. App. 84a). The court of appeals never reached the issue, holding the Secretarial lifting of the bar to be beyond her statutory powers. The issue becomes relevant, however, if petitioners' interpretation of the Act is approved here.

Section 509 of the Act permits the agency to make loans for the construction of vessels, but the conditions for making such loans were not met here, nor could they be, as section 509 prohibits, *inter alia,* the granting of loans when construction-differential subsidy is allowed. 46 U.S.C. § 1159. The Act confers no other loan authority, and, being silent on the subject of CDS payback and permanent waiver of section 506 restrictions, it obviously

[84] See especially the Government's Statement of Questions Presented (Government Brief, p. 2; see also Government Brief, pp. 52-53; Seatrain Brief, pp. 29, 68).

contains no provision relating to the method of total repayment.[85] Petitioners claimed below that this silence gave the Secretary of Commerce the widest latitude, and that no restrictions on the "form" of payment could be read into the Act. But if, as petitioners contend, the reason that repayment of subsidy does not evade the prohibitions of section 506 is because that section "is concerned solely with the extent and conditions of competition between the unsubsidized domestic fleet and *ships that continue to enjoy the benefits of CDS financing*" (Government Brief, p. 52), clearly the "form" of repayment, cash or promise, is highly relevant.

It is clear from the most everyday experience that a cash payback of subsidy and a promise to repay subsidy over 20 years are completely different transactions. In the first case the Government has its money in hand, and is therefore not subject to continuing financial risks depending upon the economic well-being of the vessel owner. The shipowner has not had the use of Government funds while engaging in the domestic trades, and the shipowner's competitors are not competing against a vessel whose cost is commensurate with the cost of vessels built in foreign yards. In the second case, the Government does not have its cash, and whether or not it will ever be repaid depends upon the unforeseeable vicissitudes of commercial life during the next 20 years. The shipowner has the use of Government funds for virtually the entire economic life of its vessel. Furthermore the shipowner's competitors are faced with competition from a vessel

[85]By contrast, when the statute might be read to have allowed such repayment, in 1936, it was not so silent. Thus the 1936 Act provided for repayment "upon such terms and conditions as the Commission may prescribe", and predecessor bills required repayment "prior to" the operation of the vessel in domestic trades. *See supra,* pp. 58-61.

whose cost was equivalent to that of vessels built in foreign yards, with cost "equalization" coming about in small doses over an extended period. Indeed, the Government concedes this difference when it speaks to the differing competitive positions of subsidized and unsubsidized tankers, where the subsidized tanker plies the domestic trade for the permitted six-month period, but repays on a prorata basis, the subsidy received. As the Government says, such prorata payment "cannot eliminate entirely the significant financial advantage held by a ship that still retains the benefit of a federal subsidy, because of the subsidized ship's overall smaller indebtedness." (Government Brief, p. 52).

Even if, however, there were some way, which there is not, to ensure that Polk Tanker's operations will be viable enough for the next 20 years to permit the promised subsidy repayment, under petitioners' theory of the Secretarial powers such repayment is not an ironclad, nonwaivable obligation. Under petitioners' theory, the Secretary possesses authority to amend and terminate contractual obligations, restricted only to those amendments or terminations which are not "expressly" prohibited by law. Since the statute is silent on the issue of subsidy repayment, and thus on the issue of the terms and form of subsidy repayment, it is likewise silent on the issue of cancellation of obligations to repay subsidy. Thus the Secretary could, under petitioners' interpretation of the Act, cancel the notes upon a finding, for example, that the STUYVESANT could be put to better use in the foreign trades than in the domestic trades. Thus the "loan" authority, which petitioners claim is merely a matter of form, rather than of substance, becomes a method of avoiding the six-month limitation on temporary transfer of CDS-built vessels in the domestic trades.

Whether or not the Government here has a present intention to utilize that method is not critical;[86] the point is that under petitioners' theory, there can be no statutory restriction of the Secretary's authority to continuously amend subsidy contracts while loans are being repaid, so as to abate the loan and renew the subsidy contract for the remaining economic life of the vessel.

That acceptance of a 20-year promissory note is equivalent to a cash loan by the agency to Seatrain and Polk cannot seriously be disputed. Petitioners, however, have continuously failed to cite any statutory authority whereby the agency may make loans for vessels being built for foreign trades under the form of subsidy grant, and then permit rededication to domestic trade, and repayment over the statutory life of the vessel. The Black Report[87] stated:

> "The present system of construction loans should be abolished, but the ship operators should be free to borrow from governmental agencies (*other than the U.S. Shipping Board, whose power to make loans should be abolished*) upon equal terms and conditions with other private enterprise."[88]

[86]Below, Government counsel pledged that this obligation would not be cancelled by the Secretary. Brief for the Federal Parties in the court of appeals in No. 77-2080 *et al.*, p. 37 n. 26. Such a pledge, whether or not binding upon future Secretaries during the next 20 years, is inconsistent with the Government's theory that the power to accept subsidy repayment inheres in the power to amend subsidy contracts except where such amendments are "expressly" restricted by law.

[87]S. Rep. No. 898, 74th Cong. 1st Sess. (1935). The report is cited by Seatrain, correctly, as the source for the 1936 overhaul of aids to the U.S. Merchant Marine. Except for section 509 of the Act, inapplicable to CDS-built vessels, the loan power was abolished.

[88]*Id.* at 44 (emphasis supplied).

That the authority to draw upon the United States Treasury is not to be lightly implied was established at least as far back as 1851 when this Court denied a writ to compel payment of a debt due from the United States in the absence of a congressional appropriation (*Reeside* v. *Walker,* 11 How. 272, 13 L.Ed. 693 (1851)). In that case, the Court said: "It is a well known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by Congress. See Constitution, art. 1, sec. 9, 1 Stat. at Large, 15." 11 How. at 291. And in *United States* v. *MacCollom,* 426 U.S. 317, 321 (1976), this Court, citing *Reeside* v. *Walker,* said:

> "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized."

As in *MacCollom,* Congress here has addressed the subject of loans by the agency, in section 509 of the Act, and the conditions for obtaining such loans have not been met. The conclusion is that the expenditure is not authorized.

Interestingly, petitioners' defense of the loan transaction has been singularly bereft of resort to the "aids" it used when seeking to persuade the judiciary that Congress intended the Secretary to waive section 506 restrictions in the first place. Thus petitioners do no claim that Congress intended the agency to make loans, or that the agency has continuously interpreted its "waiver" powers to include the lending function. The reason that petitioners can cite to no such "consistent" administrative interpretation of the Act is that the one instance in which the agency *did* waive section 506 restrictions in the 40 years in which it has administered this Act, for the Grace Line vessels, the agency *disclaimed* the power to accept repayment over time. Thus Grace Line requested that it be allowed to repay the sub-

sidy over time, and the agency then said:

> "You are advised that consideration was given to the repayment proposal as outlined in your letter of June 15, 1964. However, the 1936 Act apparently did not contemplate the acceptance of notes in favor of the Government in a transaction of this nature involving the financing of a vessel for operation in the domestic trade of the United States." (A. 364-365).

Petitioners' defenses to the argument that the Government lacks power to lend money to Seatrain in the form of acceptance of a promissory note for the repayment of a subsidy have varied as the case has progressed. To the district court, the sole defense tendered was that a promise to pay is the same as payment under the Uniform Commercial Code § 3-802.[89] In the court of appeals, the Government argued that the agency possesses power to loan money for the building of vessels under section 509 of the Act. But section 509 applies where a purchaser pays a specified part of the cost to the agency in advance, and specifically states that "[n]o construction-differential subsidy shall be allowed" with respect to a vessel built under that section. The STUYVESANT was not built under section 509.[90]

[89]The cited section applies only to situations wherein "an instrument" is taken for an underlying obligation and "instrument" is defined as a negotiable instrument. Uniform Commercial Code § 3-102(1)(e). The Uniform Commercial Code does not give any support for the desperate proposition that payment and a promise to pay over 20 years is the same thing.

[90]The Government and Seatrain also argued to the court below that if waiver were permitted upon repayment, the agency could have guaranteed the loan whereby Seatrain secured the cash for repayment under section 1104(a)(3) of the Act. Assuming again, *arguendo*, that 1104(a)(3) applied to this repayment because of the Secretary's supposed inherent power to accept such repayment, this is not what the agency did. To say that Title XI of the Act, which provides for Government *guarantees* of loans, authorizes the Government to *make* such loans is to totally rewrite the statute.

Seatrain argued to the court below that the Secretary's decision on remand, following the district court's direction that the waiver authority be exercised only upon a consideration of competitive effect, is a full answer to the issue tendered here, because the Secretary found no competitive effect based upon payment over time compared to immediate cash prepayment. This defense mistakes the nature of the claim, which is that under the Act the agency *lacks power* to make loans. Whether or not a particular loan has a "competitive effect" would be germane *if* the Act entrusted the agency with loan-making authority to be exercised upon findings relating to competitive effect.

The various challenges and defenses as to the terms and conditions upon which loans should be made, the similarity of loans to Title XI guarantees, the test of competitive effect as applied to exercise of the loan authority, all underscore the silence of the Act on the issue. The conclusion follows that loan power in the form of payment over time for subsidy repayment is beyond agency authority. As with the issue of agency power to permanently release vessels purchasers from the restrictions section of 506, Congress' silence is deafening. It should be respected.

IV. THE PURPOSES AND POLICIES OF THE MERCHANT MARINE ACT, 1936, ARE SERVED BY RESPECTING CONGRESSIONAL INTENT TO DENY CDS ASSISTANCE FOR VESSELS PERMANENTLY DEDICATED TO THE DOMESTIC TRADES.

The broad purposes of the Merchant Marine Act, 1936, are to foster the development and encourage the maintenance of a Merchant Marine sufficient to carry the commerce of the United States and capable of serving the nation's needs in time of war or national emergency (Section 101 of the Merchant Marine Act, 1936,46 U.S.C. § 1101). Achievement of those objectives in a framework including Government aids requires certainty about the Government's role in respect of all of the industrial components of the merchant marine industry – the shipyards, the ship purchasers, the ship charterers, the ship operators. The magnitude of the investment required and the volatility of the market, as shown by this record, speak eloquently of the necessity for assuring investors that while the predictability of economic forces eludes the grasp of even the most sophisticated prognosticators, at least the governmental role has boundaries. Petitioners' plea that Secretarial discretion encompass the ability to waive ships built with subsidy for the foreign trade into the domestic trade whenever the domestic market is strong and the foreign market weak and government loan guarantees are at risk will destroy the foundations upon which huge sums have been invested by entrepreneurs willing to trust their judgment of market forces without reliance on taxpayer funds.[91]

[91]The argument offered by petitioners (Seatrain Brief, pp. 72-73; Government Brief, pp. 74-75) that the industry has been on notice since the Grace Line situation that the subsidized fleet could be waived into the Jones Act trades is disingenuous, and the evidence cited unsupportive. The Grace Line situation was viewed by the industry, as

A decision to invest the enormous sums of money required for tanker construction in a U.S. yard in order to acquire vessels uniquely eligible for operation in the domestic trades will not be made unless there is as much certainty as the market allows about the vessel's prospects for employment. The agency action would establish the principle that vessels now serving in foreign trades, which were built in U.S. yards with CDS, *might* have trading restrictions waived and thus be permanently allowed to operate in the domestic trades. Which ships, how many ships, when, under what circumstances – all these questions would be matters left, if petitioners' position were adopted, to agency discretion to be decided according to the circumstances of each particular case. Such action would make economic planning impossible, which means that decisions to invest in unsubsidized ship construction would not be made. The certain knowledge at any given point in time as to which ships have been built without CDS, and are thus eligible for Jones Act trades, which ships are CDS-built and hence not, which ships are being

by Congress, as "unique," and until the actions challenged here, never repeated. The agency has never given public notice that it intended to "implement" its statutory goals by establishing a program or setting standards whereby such waivers would be made; consequently the probability thereof would not be factored by the industry. The statement of Mr. Reynolds in 1972 (quoted in Seatrain Brief, p. 73; cited in Government Brief, p. 75) did not bless, but instead merely *described*, a bill that was never enacted – the amendment to 46 U.S.C. § 1104 (a)(3) (*see supra*, p. 78-82). Moreover, the statement of the committee chairman (Seatrain Brief, p. 73) to the effect that the bill was not "controversial" was contained in a lead-off statement describing all of the amendments upon which hearings were to be held. It preceded by 32 pages the testimony of Mr. Reynolds, and in no way can be seen as an accurate reflection of industry views on the unenacted provision. *See* Proposed Amendments to Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. at 193 & 225 (1971).

built with and without CDS, all of these factors provide encouragement to the free, capital market. Given, however, the lead years of construction and the volatility of the business market, the added uncertainty which petitioners seek to impose herein – the entry, upon waiver, of the huge tonnage represented by subsidized ships built years ago when construction costs were a fraction of those that investors must now face – would lead, by the most elemental of logic, to a severe inhibition on the building and purchase of vessels dedicated to the Jones Act trades.

The snowball effect of such an inhibition is apparent. The less investment of private funds for Jones Act ships, the more pressures will there be for the waiving of restrictions on CDS-built ships so as to obtain tonnage for use in the domestic trades. More waivers will lead to an even greater unwillingness on the part of private investors to build without CDS. The end result, of course, is increased pressure on the Government for more CDS if vessels are to be built in U.S. yards. Thus this agency action, which was designed to bail out petitioner Seatrain and to save the Economic Development Administration and the Maritime Administration from the embarrassing possibility of defaults on guaranteed loans, threatens to defeat one of the basic purposes of the maritime laws, which is the promotion of a privately-financed, adequate Jones Act fleet.

Upon analysis, the theory urged here by petitioners is that there should be *no* separation of the Jones Act and subsidized fleets. While petitioners might try to limit their position to allowance of subsidized entry into the domestic fleet only before a vessel has started on its foreign life, the construction of the Merchant Marine Act which they urge supports no such limitation. If, as petitioners claim, Congress intended all along to allow subsidized ships to enter

Jones Act trades upon repayment of unamortized subsidy, that switch can be made at any time while the vessel is in service, at the discretion of the Secretary. Moreover, if the only statutory limitation, section 506, is "neutral" as to the duration of time a vessel may ply the domestic trades so long as a vessel "no longer retains the benefits of a CDS" (Government Brief, p. 53), then that vessel by disgorging (or promising to disgorge) unamortized subsidy may go in and out of the domestic trades for any periods of time, depending upon the Secretary's perceived need to protect Government guarantees of loans repayable over the life of the vessel. Furthermore, if section 506 is "neutral" on all of these issues, and if the power to amend subsidy contracts is within the broad contractual powers of the Secretary as urged here, there is nothing to prohibit the Secretary from canceling the commitment to pay back subsidy when the market once again favors foreign, rather than domestic, trade. Thus section 506 becomes "inoperative" under petitioners theory, and any separation of the Jones Act and subsidized fleets is totally within the vast realm of Secretarial discretion, unhampered by legislative guidelines which have been read out of the statute.

The issue of the proper bounds of separation of the Jones Act and the subsidized fleets is a matter of life and death to petitioners ABC and Trinidad. ABC, Trinidad, and the rest of the Jones Act fleet, do not have the "flexibility" which petitioners find "implicit" in the statute because they cannot enter the foreign trades when market vicissitudes favor the foreign market: they are permanently cost-barred. If Congress wrongly drew the line of demarcation between the Jones Act fleet and the subsidized fleet in section 506, then Congress should redelineate it after consideration of the views of all industrial segments.

Unhampered by the pressure of having committed itself to a single, massive, unviable venture into the supertanker market, Congress, but not the agency, can fairly evaluate the needs of all segments of the industry for both encouragement and protection.

If a defense of congressional rather than administrative prerogatives were needed in this area – which it is not – the facts and circumstances of this case provide that defense. What were the reasons given for the agency action taken here? Not, as now urged, the preservation of competition, the abolition of monopoly, the energy needs of the nation, all *post hoc* and flawed rationalizations; the reasons originally given remain the real reasons: to "improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce" and to avoid "jeopardiz[ing] continued operation of the Seatrain Shipbuilding Corporation" (A. 66). Before committing itself on these loan obligations, each agency of the Department of Commerce was required by statute to satisfy itself that the proposed operations in foreign commerce were financially sound.[92] They made a mistake, and their earlier evaluations of the Seatrain proposals (*supra*, pp. 7-10) show that all of the information and analytic tools to correctly evaluate the financial improbability of success were at their disposal. The Government's knee-jerk position of defending past errors by administrative encroachment into legislative prerogatives proves again the need for a judiciary capable of setting metes and bounds.

As is often the case, the attempted "bail out" for which deference to administrative power is so earnestly sought provides as little evidence of sound economic decision

[92] *See supra*, 12 & n. 8.

making as did the original Government commitments. What is the assurance that, even with this "waiver," the Government will not be required to make good on its $100 million of guarantees? Surely it cannot be a three-year charter of the vessel to Sohio, because the loan obligation must be paid over 20 years, and the ship must be profitable during at least the major portion of that time to avoid the spectre of default which now so horrifies the Government. The Government cannot claim that a domestic market is assured for 20 years because the Secretary of Commerce, in deciding that the effect on competition of waiving the STUYVESANT into the Alaskan oil trade is "none or minimal" (A. 598) limited that finding to a market analysis of three years, the Secretary disclaiming power to see further into the future than that (A. 584; *see also* opinion of the court below, Pet. App. 17a-18a & n. 34). Thus if the STUYVESANT finds no employment in a few years time, the objectives for which the Government begged judicial deference will go for naught. The effects, however, of such a decision will be felt and suffered by ABC, Trinidad and the Jones Act fleet for many years to come.

Petitioners are not content to rest their "purposes and policies" argument on the two reasons given by the agency for waiving the STUYVESANT into the Alaskan oil trade. They seek to offer this Court a broader perspective, invoking such catechisms as fair competition; avoidance of monopoly; national needs for energy (Seatrain Brief, pp. 67-72, 74-75; Government Brief, pp. 73-75). But the claims that only waiver of the subsidized fleet into the Jones Act fleet at the discretion of the Secretary will avoid monopoly, enhance fair competition, and satisfy the nation's energy needs are transparently wrong. There never has been a suggestion that the Alaskan oil trade is a monopoly trade; the Secretary's own decision on remand belies that statement (A. 582-583). The claim that "fair

competition" is enhanced by allowing CDS-built vessels which have repaid their subsidy to enter the domestic trades is contradicted by the Government's own example (Government Brief, p. 52 n. 56) showing that a prorata repayment of subsidy commensurate with the time a vessel serves the domestic trade does not equalize the position of subsidized and unsubsidized ships. It is further contradicted by the basic economic fact that it is *always* better to pay later, rather than earlier, *and especially in a period of (1) drastic increases in construction costs; and (2) severe inflation resulting in ever-increasing interest rates.* The notion that a mere repayment of subsidy five years later, or, in the present case, from five to twenty-five years later, places the subsidized and Jones Act fleets in a fair competitive relationship was questioned by none other than the present Maritime Administrator who said that "the owners of Jones Act ships, who have undertaken significant investment risks to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships *built for the foreign trade with the advantage of construction subsidy*" (*see supra,* p. 86). Finally, the notion that the waiver here promotes "fair competition" because based upon "the full disgorgement of the subsidy" (Seatrain Brief, p. 68) is contradicted by the fact that there has been no full disgorgement of the subsidy and there will not be for 20 years.

Petitioners' claim that the Jones Act fleet needs to be supplemented by the subsidized fleet to contribute towards the nation's energy crisis is patently an argument that is properly addressed to the legislature, not the judiciary. The vicissitudes of Alaskan oil output are not a matter of record here and were not initially urged below as reasons for granting the waiver since no such consideration had been made before granting the waiver. Petitioners' reliance

(Seatrain Brief, p. 71; Government Brief, p. 73) on the findings in the Secretary's decision on remand (A. 566-599) for support for the "energy crisis" argument is ill-founded, as shown by a study published by this same agency, four months after the decision on remand was issued, *changing* its conclusions respecting the previously-alleged deficit of unsubsidized tonnage necessary for the carriage of Alaskan oil.[93] According to the Secretary's forecast in the remand decision, there would be a *short term* deficit in the supply of tankers for the Alaska oil trade *through* the first quarter 1980 (A. 582-583), but the Secretary said that it was "difficult or impossible" to predict the supply and demand of tankers in the Alaska oil trade beyond 1980 (A. 584), when the present time charter of the STUYVESANT expires. The Secretary never attempted in the remand decision to show a need for additional tonnage beyond the first quarter of 1980.

In the May 3, 1978 study, however, the agency explained that the assessment undertaken in 1976 (on which the Secretary relied in making her remand decision) must be revised. This new assessment was needed because of "[s]ignificant changes since the completion of prior studies."[94] This more recent study shows a deficit of unsubsidized tankers *until* the first quarter of 1980. After that the study shows that there will be a *surplus* of unsubsidized tankers, and after 1980, the supply of unsubsidized tankers will be 160% of demand for tankers to carry oil in the Alaskan trade for the period 1980-1982-4.[95]

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[93]Assessment of Alaskan Crude Oil Distribution, Maritime Administration, Department of Commerce, May 3, 1978 (hereafter, "MarAd Study of May 3, 1978").

[94]MarAd Study of May 3, 1978, *supra,* at 2.

[95]*Id.* at 21 Table 5.

Perhaps the most novel purpose and policy argument concocted after the fact by petitioners is the suggestion (Government Brief, p. 72) that "the decision below will undoubtedly diminish the attractiveness of the CDS program . . . ."[96] One would have assumed from that argument that an important attraction of CDS, relied on by its recipients, was the possibility of switching from the foreign to the domestic market with no statutory or contractual inhibitions. But since no other subsidy recipient (with the single Grace Line exception) ever made the switch, it is hard to see why the CDS program should suddenly lose its appeal. Moreover, since the standard CDS contract prohibits the switch, a party applying for subsidy after the decision below was rendered could hardly be worse off than a party who had applied before. Finally, the Government earlier advised (Government Brief, pp. 54-55 & n. 60) that one *should* not, and petitioners did not (*but see supra,* pp. 6-10), participate in the CDS program on the assumption of obtaining a permanent release in the future. Indeed, the Government represented that participation on that assumption would be a "substantial factor" to be weighed by the Secretary in deciding upon the waiver — presumably a negative factor (pp. 54-55 & n. 60).

Petitioners should make up their mind whether CDS was meant to attract investment for foreign trade, or investment for domestic trade; the statute might aid in that determination. The statute says that the CDS program is designed to aid in the construction of vessels for U.S. foreign trade. Neither the objectives of promoting the statutory purposes nor the necessities of preserving the

[96]The Government explains (Government Brief, p. 72 n. 76) "The distinct possibility, in light of the court of appeals' ruling, that a vessel, once subsidized, will be denied available employment in the domestic trade and will be forced to default on its loans necessarily lessens the appeal of the CDS program."

proper division of powers between the executive and the legislative branches are furthered by allowing the Secretary to accomplish what Congress has refused to permit: the subsidization from public funds of vessels to serve the domestic trades which are immune from foreign competition. The predicaments in which Seatrain and the Government have placed themselves should not obscure these more important long-range goals.

CONCLUSION

For all of the foregoing reasons, this Court should sustain the decision of the court of appeals.

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October 12, 1979

APPENDIX

STATUTES INVOLVED

The following relevant statutes are set out in pertinent part, in addition to the statutes and rule reprinted in the appendices of the brief for the petitioners and the brief for the federal parties.

Declaratory Judgment Act,
28 U.S.C. § 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1159 (section 509):

Any citizen of the United States may make application to the Secretary of Commerce for aid in the construction of a new vessel to be operated in the foreign or domestic trade (excepting vessels engaged solely in the transportation of property on inland rivers and canals exclusively). If such application is approved by the Secretary of Commerce, the vessel may be constructed under the terms and conditions of this subchapter, but no construction-differential subsidy shall be allowed. The Secretary of Commerce shall pay for the cost of national-defense features incorporated in such vessel. In case the vessel is designed to be of not less than three thousand five hun-

dred gross tons and and to be capable of sustained speed of not less than fourteen knots, or in the case of a passenger vessel operating solely on the inland rivers and waterways which is designed to be of not less than one thousand gross tons and to be capable of sustained speed of not less than eight knots, or in the case of an oceangoing tug of more than two thousand five hundred horsepower or oceangoing barge of more than two thousand five hundred gross tons, or in the case of a vessel of more than two thousand five hundred horsepower designed to be capable of sustained speed of not less than forty knots, the purchaser shall be required to pay the Secretary of Commerce not less than 12½ per centum of the cost of such vessel, and in the case of any other vessel the purchaser shall be required to pay the Secretary of Commerce not less than 25 per centum of the cost of such vessel (excluding from such cost, in either case, the cost of national defense features); and the balance of such purchase price shall be paid by the purchaser within twenty-five years in not to exceed twenty-five equal annual installments, with interest at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs, the balance of such purchase price being secured by a preferred mortgage on the vessel sold and otherwise secured as the Secretary of Commerce may determine: *Provided,* That, notwithstanding any other provisions of law, the balance of the purchase price of a passenger vessel constructed under this section which is delivered subsequent to March 8, 1946, and which has the tonnage, speed,

passenger accommodations, and other characteristics set forth in section 1153 of this title, may, with the approval of the Secretary of Commerce, be secured as provided in such section, and the obligation of the purchaser of such a vessel shall be satisfied and discharged as provided in such section.

Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1244(a) (section 905(a)):

When used in this chapter –

(a) The words "foreign commerce" or "foreign trade" mean commerce or trade between the United States, its Territories or possessions, or the District of Columbia, and a foreign country, except that in the context of section 1177 of this title concerning capital construction funds and in the context of subchapter V of this chapter concerning construction-differential subsidy, the said words "foreign commerce" or "foreign trade" shall also include, in the case of liquid and dry bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit U.S.-flag bulk vessels freely to compete with foreign-flag bulk carrying vessels in their operation or in competing for charters, subject to rules and regulations promulgated by the Secretary of Commerce pursuant to section 1114(b) of this title.

Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1274(d) (section 1104(d)):

(d) No commitment to guarantee an obligation shall be made by the Secretary of Commerce unless he finds, at or prior to the time such commitment is made, that the property or project with respect to which the obligation will be executed will be, in his opinion, economically sound

and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources, and no obligation, unless made pursuant to a prior commitment, shall be guaranteed unless the Secretary of Commerce finds, at or prior to the time the guarantee becomes effective, that the property or project with respect to which the obligation is executed will be, in his opinion, economically sound and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources.

Relief Act of 1940,
46 U.S.C. § 1242a:

(a) When used in this section the term 'essential vessel' means any vessel(1) which is (A) security for any mortgage indebtedness to the United States or (B) constructed under this chapter, or required by the terms of a contract under this chapter to be operated on a certain essential foreign trade route, and (2) which it is necessary in the interests of commerce and national defense to maintain in condition for prompt use.

(b) For the purposes of preserving in the national interest the full availability and usefulness of essential vessels, which, under the provisions of the Neutrality Act of 1939 (or any proclamation issued thereunder), or compatibly with the national interest, cannot be operated in the service, route, or line to which such vessels are assigned pursuant to this chapter, or in which they would otherwise be operated, the Secretary of Commerce is authorized to make adjustments of obligations in respect to such

vessels and to make arrangements for the maintenance of such vessels, subject to the provisions of this section and to such rules and regulations as the Secretary shall prescribe as necessary or appropriate for carrying out the purposes and provisions of this section. If the Secretary, upon written application in respect of any essential vessel, determines after such examination, investigation, and proceedings as he deems desirable, that (1) the operation of such vessel in the service, route, or line to which such vessel is assigned pursuant to this chapter, or in which it would otherwise be operated, is either (A) not lawful under the Neutrality Act of 1939 (or any proclamation issued thereunder), or (B) not compatible with the maintenance of availability of such vessel for purposes of national defense and commerce, (2) it is not feasible under existing law to employ such vessel in any other service or operation in either the foreign or domestic trades (except temporary or emergency operation under subsection (c)(5) hereof), and (3) the applicant, by reason of the restrictions of the Neutrality Act of 1939, or the withdrawal of vessels for national-defense purposes under clause (1) hereof, is not earning or will not earn a fair and reasonable return on the capital necessarily employed in its business, the Secretary may make adjustments and arrangements with the applicant as provided in subsection (c) of this section, which shall continue in effect only during the circumstances above described.

(c) Such adjustments and arrangements shall include suspension of the requirement to operate such differential or construction-differential subsidy contract or mortgage or other agreement, and of the right to operating-differential subsidy in respect of such vessel. . .

Merchant Ship Sales Act of 1946,
§ 9(d), 50 U.S.C. App. § 1742(d), repealed,
Pub. L. 94-412, 90 Stat. 1258 (1976)

(d) Section 506 of the Merchant Marine Act, 1936, as amended [section 1156 of Title 46], shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clauses (1)-(3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945, and prior to the date of enactment of this Act.

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No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, ET AL., PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 595 F.2d 814. The opinion of the district court (Pet. App. 65a-95a) is reported at 445 F. Supp. 1128.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. Petitions for rehearing were

denied on March 22, 1979 (Pet. App. 62a-64a).[1] The petition for a writ of certiorari was filed on April 30, 1979, and was granted on June 18, 1979 (A. 604). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court order remanding a case for further administrative proceedings on the merits, subject to further district court review, constitutes a final decision appealable under 28 U.S.C. 1291.

2. Whether the Secretary of Commerce may relieve a vessel that has received and repaid a federal construction subsidy of the trade restrictions imposed by Section 506 of the Merchant Marine Act.

STATUTES AND RULE INVOLVED

The relevant statutes and rule are reproduced in the Appendix, *infra*, 1a-22a.

STATEMENT

1. The Merchant Marine Act, 1936 ("the Act"), 46 U.S.C. 1101 *et seq.*, represents an effort by the federal government to protect the national defense and to enhance foreign and domestic trade by "foster[ing] the development and encourag[ing] the maintenance of [an adequate American] merchant marine." 46 U.S.C. 1101. See, *e.g.*, *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 765-766 (D.C. Cir. 1977); *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1073-1074 (D.C. Cir. 1975), cert. denied, 424 U.S. 912 (1976). Because American maritime expenses (such as wages and domestic construction costs) have historically exceeded the equivalent expenses incurred by foreign carriers, the Act establishes several grant and loan programs designed to stimulate the construction of ships at American shipyards and to ensure a substantial American merchant marine fleet operated by American crews. See 46 U.S.C. 1131 *et seq.*; H.R. Rep. No. 1277, 74th Cong., 1st Sess. 1-4, 11-13 (1935); H.R. Rep. No. 2168, 75th Cong., 3d Sess. 9, 23 (1938).[2] In particular, Title V of the Act, 46 U.S.C. 1151 *et seq.*, empowers the Secretary of Commerce ("the Secretary") to subsidize the construction costs of this country's overseas merchant fleet. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 179 n.28 (1978); *States Marine International, Inc.* v. *Peterson*, *supra*, 518 F.2d at 1082-1083.[3] These grants are referred to as construction differential subsidies ("CDS").[4]

[1] An amended order denying the suggestions for rehearing en banc was filed on April 3, 1979 (A. 602).

[2] In addition to the construction subsidy program at issue in this case, the Act contains an operating subsidy program ("ODS") (see 46 U.S.C. 1171 *et seq.*), a direct purchase program (46 U.S.C. 1191 *et seq.*), and a loan guarantee program for ship financing (46 U.S.C. 1271 *et seq.*).

[3] The program applies to the reconditioning and reconstruction of old vessels as well as to new construction. See 46 U.S.C. 1151(c).

[4] Between 1936 and 1978 the federal government awarded approximately $2.871 billion in CDS grants. Department of Commerce, *The Annual Report of the Maritime Administration for Fiscal Year 1978* 97 (1979). In FY 1978, the CDS program involved a total of $156 million. *Ibid.*

Only American citizens or American shipyards may receive CDS grants. 46 U.S.C. 1151(a), 1244(c). To qualify, the applicant must establish to the Secretary's satisfaction [5] that the proposed vessel's specifications will serve the needs of foreign commerce and national defense. 46 U.S.C. 1151(a)(1).[6] In addition, if the applicant is the proposed ship purchaser, he must demonstrate his financial and technical ability to operate and maintain the ship. 46 U.S.C. 1151 (a)(2). Finally, the Secretary must conclude that granting the CDS "is reasonably calculated to carry out effectively the purposes and policy of" the Act. 46 U.S.C. 1151(a)(3).

In the event that the Secretary approves the application, the applicant and the Secretary enter into a contract governing the details of the CDS transaction. Although the Secretary has broad contractual powers

[5] The Secretary has delegated the administration of the CDS program (as well as the ODS program, see note 2, *supra*) to the Maritime Subsidy Board. The Board consists of the Assistant Secretary for Maritime Affairs (who is also the administrator of the Maritime Administration, an operating unit of the Department of Commerce, see Merchant Marine Act of 1970, Pub. L. No. 91-469, Section 38, 84 Stat. 1036), the Deputy Assistant Secretary for Maritime Affairs, and the General Counsel of the Maritime Administration. 38 Fed. Reg. 19707-19708 (1973). See generally 46 C.F.R. 201 *et seq.* The Secretary may review decisions of the Maritime Subsidy Board. See *id.* at Part 202.

[6] The Secretary is required to submit the plans and specifications to the Navy for its determination whether "such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." 46 U.S.C. 1151(b).

under the Act (see 46 U.S.C. 1117, 1151, 1152 and 1154), the statute itself enumerates several terms that must be included in the contract. The ship must be built in an American shipyard, using "so far as practicable, only articles, materials, and supplies, of the growth, production, or manufacture of the United States * * *." 46 U.S.C. 1155.[7] The CDS is calculated as the difference between construction costs at the domestic shipyard and those at a representative foreign shipyard, but in no event may it exceed 50% of the cost of the proposed ship. 46 U.S.C. 1152(b). Payment of the CDS must follow either of two methods: the Secretary may contract with the shipyard to purchase the vessel and then resell the ship to the applicant for the purchase price less the CDS (46 U.S.C. 1152(a)) or she may pay the CDS directly to the shipyard, which would then collect the remainder of the purchase price from the applicant. 46 U.S.C. 1154.[8]

The CDS recipient, in turn, covenants to operate the vessel as an American flag ship for 25 years (46 U.S.C. 1153), unless the ship is a tanker, in which event the covenant runs for 20 years. Act of June 12, 1960, Pub. L. No. 86-518, Section 9, 74 Stat. 216, 217; see 46 U.S.C. 1125 Note. Moreover, except for

[7] If no American shipyard submits an acceptable bid, the Secretary may arrange for the construction of the vessel in a Navy shipyard. 46 U.S.C. 1152(e).

[8] Of course, the shipyard itself may be the applicant, in which case it must agree to sell the ship to a purchaser willing to operate the vessel in accordance with the requirements of the Act described below.

two limited circumstances, Section 506 of the Act requires the purchaser and all subsequent owners of a CDS ship to operate the vessel during its useful life (20 or 25 years) exclusively in this country's so-called "foreign trade." 46 U.S.C. 1156.[9] The first exception is that CDS vessels may sail in the domestic trade as either the first or last leg of an overseas voyage. 46 U.S.C. 1156. Second, the Secretary may consent to the operation of a CDS vessel in the domestic trade for up to six months in any 12-month period whenever she determines that "such transfer is necessary or appropriate to carry out the purposes of this chapter." 46 U.S.C. 1156. When a CDS vessel operates in the domestic trade, either as an adjunct to a foreign voyage or as an authorized temporary (six month) transferee, the owner of the vessel must repay a proportional percentage of the CDS.[10]

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[9] "Foreign trade" means trade between a foreign port and an American port. 46 U.S.C. 1244(a). "Domestic trade" means trade between American ports. See *American Maritime Association* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). Only American flag vessels may operate in the domestic trade. See 46 U.S.C. 883.

[10] Repayment of the CDS lessens the otherwise potential unfair competition between CDS vessels and the domestic merchant fleet, which is ineligible for CDS money. See H.R. Rep. No. 1277, *supra*, at 22-23, 35. With regard to the temporary domestic operation as part of an overseas voyage, the repayment equals the percentage of the annual portion of the CDS that the gross revenues attributable to the domestic traffic bear to the ship's annual gross revenues. With regard to the temporary (six month) transfer to the domestic service, the repayment equals the portion of the CDS that the period of temporary transfer bears to the useful life of the ship (*i.e.*, 20 or 25 years).

2. In 1969, petitioner Seatrain Shipbuilding Corporation ("Seatrain"), a wholly-owned subsidiary of Seatrain Lines, Inc., entered into a long-term lease of the former Brooklyn Navy Yard and began constructing a series of supertankers. As part of its construction program, Seatrain modernized the Navy Yard to accommodate civilian shipbuilding and commenced an extensive on-the-job training program directed at the predominantly minority and largely underemployed population living in the surrounding area. Although Seatrain expended approximately $38 million of its own funds on this ambitious project, it also received substantial federal and local financial assistance. In particular, the Economic Development Administration of the Department of Commerce ("EDA") loaned Seatrain $5 million outright and guaranteed 90% of another $82 million in loans (Pet. App. 9a, 69a; A. 111-113).[11]

In early June 1972, Seatrain applied for a CDS with regard to the T.T. STUYVESANT, a 225,000 deadweight ton oil tanker.[12] The Maritime Subsidy

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[11] The EDA, which administers the Public Works and Economic Development Act, 42 U.S.C. 3121 *et seq.*, initially guaranteed 90% of $42 million in loans with regard to Seatrain's conversion of the Navy Yard (Pet. App. 112a). In 1975, the EDA guaranteed 90% of another $40 million in loans in order to keep the facility in operation and to ensure completion of the STUYVESANT (A. 542-551). See 42 U.S.C. 3142; 13 C.F.R. Part 306.

[12] The STUYVESANT was the third supertanker built by Seatrain at the Navy Yard facility. Seatrain also constructed the previous two tankers (the T.T. BROOKLYN and the T.T. WILLIAMSBURG) with CDS monies (A. 112).

Board granted Seatrain's application on June 30, 1972, and awarded it a $27.2 million CDS to build the tanker. Moreover, the federal government guaranteed another $30.2 million in loans for the construction of the STUYVESANT pursuant to Title XI of the Act, 46 U.S.C. 1271 *et seq.* In accordance with Section 506 of the Act, Seatrain and petitioner Polk Tanker Corporation, a corporate affiliate of Seatrain and the owner of the STUYVESANT, agreed in return to operate the STUYVESANT exclusively in the foreign trade (Pet. App. 8a-9a, 69a; A. 19, 116-117, 436, 441-506, 508).

Unfortunately, by the time the STUYVESANT was completed in 1977, no market existed for the tanker in the foreign trade. The low oil prices and high demand for oil in the 1960's and early 1970's had spurred a world-wide flurry of oil tanker construction, resulting in an overabundance of tankers. In addition, the Arab oil embargo in 1973 dramatically reduced the demand for oil below what had been expected. Because (as noted above) American flag vessels face higher construction and operating costs, they are simply unable to compete with the surfeit of foreign vessels despite the CDS and ODS programs (Pet. App. 9a-10a, 69a; A. 34, 112-113, 133, 508, 570).

Although there continues to be no foreseeable prospect for the STUYVESANT's gainful employment in the foreign trade, there is a demand for the STUYVESANT's services in the Alaskan oil trade. But the Alaskan oil trade involves shipping between

Alaska and either East or West Coast ports—in short, domestic trade. Because the STUYVESANT had received a CDS, Section 506 of the Act precluded it from operating in the domestic trade for more than six months in any year. It is not economical, however, to operate the STUYVESANT for only six months per year, and no shipper in the Alaskan trade would charter the tanker on a part-time basis. Thus, in June 1977 the Standard Oil Company of Ohio (SOHIO) contracted with petitioner Polk for a three-year charter of the STUYVESANT in the Alaskan trade, but it conditioned the deal on petitioner's arranging for the STUYVESANT to operate in the domestic trade for the entire three years (Pet. App. 9a-10a, 69a-70a; A. 113-115, 133, 570-571).

Accordingly, in July 1977 petitioners filed an application with the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board, seeking a three-year waiver from the restrictions of Section 506 in exchange for a pro rata repayment of the CDS. See 42 Fed. Reg. 37229 (1977). Subsequently, in August 1977, petitioners withdrew this application in the face of objections by various carriers in the Alaskan trade. At the same time, however, petitioners submitted a new application, requesting that the Secretary of Commerce accept full repayment of the STUYVESANT's CDS in exchange for the complete termination of the STUYVESANT's domestic trade limitations (Pet. App. 10a-11a, 70a; A. 18-33, 115-116, 529).

On August 31, 1977, the Secretary (through her designees) agreed to release the STUYVESANT permanently from its Section 506 restrictions on repayment in full of the CDS. Petitioner Polk promised to repay the $27.2 million CDS by means of a fully-secured 20-year interest-bearing note, and the Secretary agreed to delete the Section 506 restrictions from the CDS contract. Simultaneously with the consummation of this agreement, petitioner Polk was to transfer title in the STUYVESANT to the United States Trust Company ("USTC") as trustee for the equity owner, the General Electric Credit Corporation ("GECC"). As part of this sale, the Secretary approved the issuance of $31 million worth of federally-guaranteed (Title XI) bonds on behalf of USTC. USTC, which was to assume both the 20-year note and the more than $60 million outstanding indebtedness on the STUYVESANT (including the $31 million in newly-issued bonds), agreed to use the bond proceeds to pay off $28 million in EDA-guaranteed loans regarding the Brooklyn Navy Yard. USTC further agreed to pay petitioner Polk an additional $32.6 million, to be held in a special account as security for a guarantee by Seatrain Lines, Inc., to GECC. Finally, USTC planned to charter the STUYVESANT to Queensway Tankers, which in turn was to charter it to SOHIO for three years (Pet. App. 11a, 70a-71a; A. 34-44, 116-119).

In approving these transactions, the Secretary found that her actions were warranted because (1) the STUYVESANT could be operated profitably only

in the Alaskan trade, (2) the CDS repayment and SOHIO charter would improve the security for debts owing to the government and prevent default on the government-guaranteed obligations, and (3) failure to approve the transactions would jeopardize the continued economic viability of Seatrain and its Brooklyn operations, which are backed by substantial government guarantees (Pet. App. 91a; A. 34).

3. On September 22, 1977, respondents Shell Oil Company, Alaska Bulk Carriers, Inc., and Trinidad Corporation ("the plaintiffs") filed suit in the United States District Court for the District of Columbia against various federal defendants.[13] The plaintiffs, who own and operate vessels in the Alaskan trade, alleged that (1) the Secretary is without power to release the STUYVESANT from its Section 506 restrictions, (2) even if the Secretary could release the tanker from the restrictions in return for full repayment of the CDS, she abused her discretion in this case by failing to consider the competitive effects of these transactions, and (3) in authorizing the CDS repayment, the Secretary did not adhere to the procedures prescribed by the Administrative Procedure

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[13] The defendants were Secretary of Commerce Juanita Kreps, then Assistant Secretary of Commerce Robert Blackwell, then Deputy Assistant Secretary of Commerce Howard Casey, then General Counsel to the Maritime Administration Samuel Nemirow, the Maritime Administration, and the Maritime Subsidy Board (Pet. App. 4a, 66a; A. 6-7, 9, 45, 47). The district court allowed petitioners to intervene as defendants (A. 3).

Act ("APA"), in violation of 5 U.S.C. 706(2)(D).[14] The district court issued a temporary restraining order. On September 30, 1977, the court dissolved that order and denied the plaintiffs' request for a preliminary injunction.[15] The STUYVESANT transactions were closed the same day (Pet. App. 12a, 66a, 71a-72a; A. 6-16, 45-63, 170-171).

Both sides then moved for summary judgment. On November 22, 1977, the district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from its Section 506 trade restrictions in exchange for repayment of the CDS. According to the district court, such authority is inherent in the Secretary's broad contractual powers under Sections 207, 504, and 1104(a)(3) of the Act, 46 U.S.C. 1117, 1154 and 1274(a)(3). The court further held, however, that the Secretary had abused her discretion in failing to analyze the economic effects of the STUYVESANT transactions on domestic carriers. Accordingly, the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. Finally, the court denied the parties' cross-motions for summary judgment regarding the

[14] Plaintiffs claimed that the Secretary had improperly withheld information about the STUYVESANT decisions from the public.

[15] The court concluded that "plaintiffs have not sustained their burden to establish immediate and irreparable injury * * * [and they] have not * * * proved a likelihood of success on the merits" (A. 171).

plaintiffs' APA claim, finding that material facts relating to it were in dispute (Pet. App. 65a-95a).

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss their APA claim and asked for entry of a "final order." On November 30, 1977, the district court granted this motion and entered a "final order," apparently relying on Fed. R. Civ. P. 54(b) (A. 558-559). While the Secretary was still conducting the proceedings on remand, the plaintiffs appealed from the district court's holding that the Secretary has the authority to accept repayment of the CDS and to permit a ship formerly subject to trade restrictions to engage in the domestic market.[16]

Prior to oral argument in the court of appeals, the Secretary completed the remand proceedings, concluding that the STUYVESANT transactions would have little or no adverse effect on the plaintiffs. In particular, the Secretary made detailed findings about the demand for tankers in the Alaskan trade and determined that demand would continue to exceed supply for the foreseeable future (A. 566-599). The Secretary therefore adhered to her prior decisions regarding the STUYVESANT.[17]

[16] Petitioners cross-appealed, challenging the plaintiffs' standing to bring this suit. See note 38, *infra*.

[17] Plaintiff Shell filed a second suit in the district court challenging the Secretary's findings on remand. *Shell Oil Co.* v. *Kreps*, Civ. No. 78-1919 (D. D.C. Oct. 13, 1978). The district court dismissed that action without prejudice following the court of appeals' decision in this case.

4. A divided panel of the court of appeals reversed and remanded, holding that the Secretary cannot lift the STUYVESANT's domestic trade restrictions (Pet. App. 1a-51a). The court rejected the Secretary's argument that her broad contractual powers under the Act supplied such authority, concluding that the six-month temporary waiver provision in Section 506 impliedly negated any authority to grant permanent releases. The court also concluded that no other provision of the Act empowered the Secretary to relieve a vessel of its CDS restrictions and that it need not defer to the contrary administrative construction because "[w]e find the Agency's internal interpretations of dubious consistency, and neither numerous nor impressive" (*id.* at 32a).

Judge Bazelon dissented, arguing that the language and legislative history of Section 506 failed to support the majority's conclusion that Congress intended to preclude permanent removal of a vessel's domestic trading restrictions (Pet. App. 52a-55a). In his view, Section 207 of the Act, 46 U.S.C. 1117, empowered the Secretary to relieve the STUYVESANT of its contractual obligations in return for full repayment of the CDS (Pet. App. 60a n.17). Furthermore, Judge Bazelon noted that the Secretary's construction of the Act, which was supported by several sections of the statute and by the legislative history of the 1972 amendments to the Act, was entitled to substantial deference (*id.* at 55a-61a). Finally, Judge Bazelon observed that "full repayment [of the CDS] places the formerly subsidized carrier on an equal footing

with the other vessels in the [domestic-unsubsidized] fleet, and the possibilities of abuse are thereby eliminated" (*id.* at 61a).[18]

SUMMARY OF ARGUMENT

Under Title V of the Merchant Marine Act, 1936, 46 U.S.C. 1151 *et seq.*, the federal government subsidizes the construction costs of this country's overseas merchant marine fleet. In order to effectuate this construction differential subsidy ("CDS") program, the Act confers broad contractual powers on the Secretary of Commerce. As we demonstrate in point II, those powers include the authority to relieve a CDS-financed vessel of the trade restrictions imposed by Section 506 of the Act, 46 U.S.C. 1156, in return for repayment in full of the CDS. In our view, however, this issue of statutory power is not properly before the Court, because the court of appeals lacked jurisdiction to hear this case.

I.

A. The final judgment rule, now codified at 28 U.S.C. 1291, permits the courts of appeals to review "final decisions" of district courts. Because Section 1291 embodies a strong congressional policy against piecemeal review, "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the

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[18] Judge Bazelon added, however, that in order to achieve complete equality he would "require the amount of repayment to include interest on the [CDS] subsidy [between 1972 and 1977]" (Pet. App. 59a n.15).

District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Accordingly, the courts of appeals have uniformly concluded that a district court order that does not finally determine the merits of a controversy but rather remands the case for further non-ministerial administrative proceedings is ordinarily not a final decision. There is no justification for departing from that rule here.

In its November 30, 1977 order, the district court held that, although the Secretary is empowered to undo or modify a CDS transaction in appropriate circumstances, she had abused her discretion in this case by failing to consider the economic impact of the STUYVESANT transaction on the existing Alaskan trade. The court therefore remanded the case to the Secretary for prompt consideration of that economic issue, following which further review in the district court was contemplated. The November 30 order thus did not finally decide plaintiffs' claim for relief, namely, the exclusion of the STUYVESANT from the Alaskan trade. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976); *Boston & Maine Railroad* v. *United States*, 358 U.S. 68 (1958). Plaintiffs might have prevailed before the Secretary, in which event they would have had no need to appeal. Moreover, since the November 30 order decided an issue that is central, not collateral, to the merits of this controversy and that could have been adequately

reviewed upon entry of a final decision following the remand proceedings, there is no reason to stretch the finality rule to encompass this order.

This analysis is buttressed by the policies that inform the final judgment rule. If remand orders such as the one at issue here were appealable as of right, the already congested courts of appeals would be inundated by unnecessary or duplicative appeals and would be forced to decide legal issues without the benefit of a fully developed record. Furthermore, allowance of such appeals would adversely affect the administration of justice at the district court level. As this Court has repeatedly observed, interlocutory appeals interfere with district court calendars, indiscriminately thrust the appellate courts into the trial process, and generally increase the cost and time involved in dispute resolution. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473-476. In sum, even assuming that immediate appellate review of district court remand decisions such as the November 30 order might occasionally aid a particular litigant or expedite a particular litigation, those incremental benefits would be far outweighed by the substantial costs that would be imposed on the judicial system as a whole, for "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957).

B. The district court's attempt to certify the November 30 order in accordance with Rule 54(b) of the Federal Rules of Civil Procedure did not render that decision final within the meaning of Section

1291. Rule 54(b) authorizes a district court to enter a final judgment as to one or more distinct claims in circumstances in which other, independent claims remain to be decided. The rule is inapplicable to single claim actions. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). Here, plaintiffs alleged only one claim for relief arising out of one set of facts: that the STUYVESANT could not lawfully operate in the Alaskan trade for more than six months per year. To be sure, plaintiffs asserted two legal theories in support of their single claim. But it is well settled that a district court decision rejecting less than all alternative legal theories underlying a single claim may not be certified under Rule 54(b).

Nor did the district court's improper Rule 54(b) certification satisfy the strict requirements for taking an interlocutory appeal pursuant to 28 U.S.C. 1292(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 745-746. Section 1292(b) permits appellate review of non-final orders, but only when three essential conditions have been met. Plaintiffs' appeal satisfied none of these conditions: plaintiffs did not timely move to certify their interlocutory appeal in accordance with Section 1292(b), and neither the district court nor the court of appeals expressly exercised its discretion to allow the appeal.

C. Finally, the November 30 order was not appealable as an interlocutory order "refusing * * * [an] injunction[]." 28 U.S.C. 1292(a)(1). As the Court explained in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), Section

1292(a)(1) permits interlocutory appeals only from those orders that "settle * * * the merits of the [injunctive] claim." The district court did not settle the merits of plaintiffs' request for a permanent injunction. Instead, it merely rejected one of plaintiffs' legal theories underlying the claim for injunctive relief and deferred ruling on the other theory pending the outcome of the remand proceedings.

II.

If the Court disagrees with the government's jurisdictional arguments, it must determine whether the Secretary may permanently lift the trade restrictions imposed by Section 506 of the Act from a vessel that has fully repaid its CDS. We submit that the Secretary has authority to modify or undo a CDS transaction as part of her broad contractual powers under the Act. "When Congress in an act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580 (1963). Furthermore, Section 207 of the Act provides that the Secretary may "contract[] * * * to protect, preserve, or improve the collateral held by [the government] to secure indebtedness," and here the Secretary expressly found that the STUYVESANT transaction was necessary to avoid default on millions of dollars of government-guaranteed loans. Thus, unless some provision of the Act explicitly prohibits the Secretary from terminating the Section 506 trade limitations in exchange for full repayment of a CDS, the court of

appeals incorrectly held that the STUYVESANT transaction was unlawful.

The court of appeals concluded that Section 506 of the Act impliedly constitutes a statutory bar to the STUYVESANT transaction. Section 506 does limit the extent of domestic trading that a vessel that enjoys the benefits of a CDS may carry on. It does not, however, govern the trading opportunities of a vessel that has completely relinquished the benefits of a CDS. Nothing in the language of Section 506 purports to restrict permanently a ship that has received a CDS, even if that ship has completely amortized or fully repaid its subsidy. Moreover, because Section 506 only addresses the permissible amount of competition between subsidized and unsubsidized vessels, the court of appeals' decision, which inhibits competition within the unsubsidized fleet, does not effectuate the purposes of that section. In short, the STUYVESANT transaction is quite different from the temporary transfers to the domestic trade that are the subject of Section 506.

The legislative history of the Act confirms that Congress intended to allow reverse-CDS transactions. As originally passed in 1936, the Act unquestionably permitted the Secretary to relieve a vessel of its domestic trade restrictions on repayment of "an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid * * * as the remaining economic life of the vessel bears to its entire economic life." Merchant Marine Act, 1936, ch. 858, Section 506, 49 Stat. 1999. At the same

time, the original statute was ambiguous as to whether a pro rata CDS repayment was required when a subsidized vessel entered the domestic service on a temporary basis. In amending the Act in 1938 to eliminate the latter confusion, Congress deleted the Secretary's express authority to enter into STUYVESANT-type transactions. The legislative history of these amendments strongly indicates, however, that the deletion was inadvertent and that Congress desired to increase, not to limit, the Secretary's power to administer the CDS program in order to effectuate the statutory goals.

The Secretary has construed the Act on a number of occasions to permit the permanent release of a vessel's trade restrictions on repayment of the CDS. The court of appeals should have deferred to this reasonable and long standing administrative construction of the Act. The court's failure to do so is particularly inexcusable because Congress has repeatedly ratified that construction. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969). Indeed, Congress has not only expressly acknowledged and appproved the Secretary's interpretation, it has also amended the Act in order to facilitate CDS repayments for the purpose of allowing previously subsidized ships to engage in the domestic trade.

Finally, the court of appeals' decision is inconsistent with the overriding policy of the Act, which is to develop and maintain an active, modern merchant marine in the United States. 46 U.S.C. 1101. The decision below would compel the STUYVESANT to be laid up despite the scarcity of tankers in the Alaskan oil trade and despite the substantial adverse economic impacts—including the preservation of plaintiffs' economic control of the Alaskan market—that would inevitably result from the STUYVESANT's forced unemployment. Furthermore, in the long run, a decision preventing the Secretary from ever releasing a vessel from its Section 506 restrictions would undoubtedly lessen the attractiveness of the CDS program and would diminish, rather than enhance, the growth of this nation's merchant fleet.

ARGUMENT

I.

THE COURT OF APPEALS LACKED JURISDICTION OVER THIS CASE BECAUSE THE DISTRICT COURT'S NOVEMBER 30 ORDER WAS A NON-APPEALABLE INTERLOCUTORY DECISION

In our view, the court of appeals was without jurisdiction to hear plaintiffs' appeal from the November 30 order of the district court. Because the district court remanded the case to the Secretary for further proceedings on the merits, following which additional review in the district court was contemplated, the November 30 order was not a "final decision" under 28 U.S.C. 1291. Nor could the court's erroneous invocation of Rule 54(b) of the Federal Rules of Civil Procedure render the November 30 order appealable, because that order did not finally settle any party's claims or finally determine a separate claim for relief. Moreover, although Congress has created several narrow exceptions to the final judgment rule, the November 30 order was not appealable under any of these exceptions.

A. The District Court's Order Remanding The Case For Further Administrative Proceedings Was Not A Final Decision Appealable Under 28 U.S.C. 1291

1. Appellate jurisdiction is, of course, a matter of legislative grace, dependent on a "clear statutory mandate." See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394, 399 (1957); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). In the federal system, the

dominant principle of appellate jurisdiction has always been the final judgment rule. See, *e.g.*, *DiBella* v. *United States*, 369 U.S. 121, 124-126 (1962); C. Wright, *Law of Federal Courts* § 101, at 452 (2d ed. 1970).[19] The first Judiciary Act provided that appellate review was available only with regard to "final judgments and decrees." [20] Similarly, with the exception of interlocutory orders "granting or continuing" injunctions, the jurisdiction of the courts of appeals was initially limited to review of "final decisions." See Sections 6 and 7 of the Evarts Act (Act of March 3, 1891), ch. 517, 26 Stat. 826, 828.[21] As we discuss below, Congress has from time to time created limited statutory exceptions to the final judgment rule. See *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 n.6 (1955); 28 U.S.C. 1292. Nonetheless, the finality rule, which is now codified at 28 U.S.C. 1291, still largely governs questions of federal appellate jurisdiction.

The jurisdictional question posed by this case is whether an order remanding a case for further non-

[19] The final judgment rule was derived from well established English antecedents. *McLish* v. *Roff*, 141 U.S. 661, 665 (1891); *Bachowski* v. *Usery*, 545 F.2d 363, 367 (3d Cir. 1976); see, *e.g.*, *Metcalfe's Case*, 11 Co. Rep. 38a, 77 Eng. Rep. 1193 (K.B. 1615).

[20] Act of September 24, 1789, ch. 20, Sections 21, 22, 25, 1 Stat. 73, 83-85.

[21] See also Judicial Code of 1911 (Act of March 3, 1911), ch. 231, Section 128, 36 Stat. 1087, 1133; Act of February 13, 1925, ch. 229, 43 Stat. 936-937.

ministerial administrative proceedings is a "final decision" within the purview of Section 1291. The Court has never precisely addressed this issue; it has, however, construed Section 1291 and its predecessors on numerous occasions. We submit that these decisions—although "not altogether harmonious," see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 n.9 (1974), quoting *McGourkey* v. *Toledo & Ohio Ry.*, 146 U.S. 536, 545 (1892)—strongly support the conclusion that the court of appeals lacked jurisdiction to consider plaintiffs' appeal.

Consistent with the language [22] and legislative history [23] of the finality rule, the Court has repeatedly

[22] *Webster's Third New International Dictionary* 851 (1976) defines "final" as "CONCLUSIVE, DECISIVE"; "ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding but not precluding an appeal"; and "LAST, TERMINATING." *The Shorter Oxford English Dictionary* 700 (1966) similarly defines "final" as "[c]oming at the end; marking the last stage; ultimate. * * * Putting an end to something; conclusive * * *. Completion, end, finish."

[23] In enacting the Judiciary Act of 1789, Congress did not expressly illuminate what it considered to be a "final decree." However, insofar as Congress based the final judgment rule on contemporaneous English practice, it is reasonable to infer that Congress intended a final decree to be an order that conclusively terminated all issues raised in a case. See note 19, *supra*.

The legislative history accompanying the Interlocutory Appeals Act of 1958, Pub. L. No. 85-919, 72 Stat. 1770, 28 U.S.C. 1292(b), is more instructive. That statute expanded the jurisdiction of the courts of appeals by permitting discretionary review of non-final orders in exceptional cases. See, *e.g.*, Note, *Discretionary Appeals of District Court Interlocu-*

remarked that ordinarily a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978); *Parr* v. *United States*, 351 U.S. 513, 518 (1956); *Baltimore Contractors, Inc.* v. *Bodinger*, *supra*, 348 U.S. at 178; *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546 (1947); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920); *St. Louis, Iron Mountain & Southern R.R.* v. *Southern Express Co.*, 108 U.S. 24, 28-29 (1883); *Bostwick* v. *Brinkerhoff*, 106 U.S. 3 (1882). Indeed, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up * * *." *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948). See *Canter* v. *American Insurance Co.*, 28 U.S. (3 Pet.) 306, 318 (1830); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976). To the contrary, because the final judgment rule "has the support of considerations generally applicable to good judicial administration * * * [,] [o]nly in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). See also *DiBella* v. *United States*, *supra*, 369 U.S. at 125-127. This case does not warrant an exception from the rule.

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tory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 Yale L. J. 333 (1959). The House Report accompanying the Interlocutory Appeals Act explained (H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958)):

> A final order is a judgment or decree which disposes of the case in its entirety with respect to all parties and all causes of action, leaving nothing except the carrying out of the judgment or decree.

See also S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958). The views of the Congress that amended the final judgment rule are entitled to significant weight. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958).

The district court's order of November 30, 1977, did not conclusively decide the merits of this case. The court did rule that the Secretary has power to rescind a CDS transaction, but that was not the only argument plaintiffs presented in support of their claim for relief. Plaintiffs also contended that the Secretary had abused her discretion in failing to consider the economic impact of the STUYVESANT transaction on the Alaskan trade (A. 14-15, 60-63). The district court agreed with this contention and therefore granted plaintiffs partial summary judgment. The court expressly concluded that "the Secretary's decisions concerning the STUYVESANT were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because she failed to consider the competitive effects of her decisions" (Pet. App. 94a). Accordingly, the court remanded the case for prompt additional administrative hearings.

Plaintiffs were thus not conclusively denied the relief they sought. Rather, if they could have convinced the Secretary on remand that the STUYVESANT transaction was improper because of its economic effects or, failing that, could have demonstrated to the district court on review of the decision on remand that the Secretary had abused her discretion or had acted arbitrarily, plaintiffs would have had no cause to complain, and no reason to appeal to the court of appeals.

For this reason, the courts of appeals have emphasized time and again that an order remanding a case for further administrative proceedings—like an order referring or remanding a case to a master for an evidentiary hearing,[24] overruling a demurrer,[25] granting partial summary judgment,[26] denying a motion for summary judgment or dismissal,[27] or granting a new trial,[28] or like any other decree that

[24] See, *e.g.*, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957); *Latta* v. *Kilbourn*, 150 U.S. 524, 540 (1893); *McGourkey* v. *Toledo & Ohio Ry.*, *supra*, 146 U.S. at 545; 9 *Moore's Federal Practice* ¶ 110.08 [01], at 116 (2d ed. 1975).

[25] See, *e.g.*, *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953).

[26] See, *e.g.*, *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 742-744; see 9 *Moore's Federal Practice*, *supra*, ¶ 110.08 [01], at 116.

[27] See, *e.g.*, *Catlin* v. *United States*, *supra*, 324 U.S. at 232-233. Cf. *Cobbledick* v. *United States*, *supra*; see 9 Moore's *Federal Practice supra*, ¶ 110.08 [01], at 115-116.

[28] See, *e.g.*, *Gospel Army* v. *Los Angeles*, *supra*; Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 356 n.44 (1961).

does not conclusively determine every issue and every prayer for relief but rather entails additional nonministerial proceedings relating to the merits of the controversy [29]—is ordinarily not a final decision. See, *e.g.*, *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978); *Giordano* v. *Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Silver* v. *Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976); *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620, 624 (10th Cir. 1973); *Barfield* v. *Weinberger*, 485 F.2d 696 (5th Cir. 1973); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Dalto* v. *Richardson*, 434 F.2d 1018 (2d Cir. 1970); *United Transportation Union* v. *Illinois Central R.R.*, 433 F.2d 566 (7th Cir. 1970), cert. denied, 402 U.S. 915 (1971); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). See also 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914, at 550-553 (1976).[30] As Mr. Justice (then Judge)

[29] See, *e.g.*, *Parr* v. *United States*, *supra*, 351 U.S. at 518-520; *Swift & Company Packers* v. *Companie Columbiana Del Caribe, S. A.*, 339 U.S. 684, 689 (1950); *Republic Gas Co.* v. *Oklahoma*, *supra*, 334 U.S. at 68; *Schoenamsgruber* v. *Hamburg American Line*, 294 U.S. 454, 456 (1935); *Alexander* v. *United States*, 201 U.S. 117 (1906).

[30] The rule illustrated by these cases is that "under normal circumstances a remand to an administrative agency [or an executive department] for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291." *Ringsby Truck Lines, Inc.* v. *United States*, *supra*, 490 F.2d at 624. Where, however, the remand order requires only a ministerial act, such as the entry of an award of an undisputed amount

Blackmun explained in *Bohms* v. *Gardner*, *supra*, 381 F.2d at 285, involving a remand order virtually indistinguishable from that at issue here:

> The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief

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of benefits in a social security case, the order of remand may be final. Cf. *Republic Gas Co.* v. *Oklahoma*, *supra*, 334 U.S. at 68; *McGourkey* v. *Toledo & Ohio Ry.*, *supra*, 146 U.S. at 545; *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1856). Here, of course, the proceedings on remand were clearly not ministerial in nature. The remand required a prompt hearing on the economic impact issue, following which the Secretary could well have reversed her decision to enter into the challenged transaction.

Some courts of appeals have concluded that where a remand order decides an issue that cannot effectively be reviewed after entry of a final judgment following the remand proceedings, the remand order will be considered final and appealable. See, *e.g.*, *Gueory* v. *Hampton*, 510 F.2d 1222 (D.C. Cir. 1974); *Gold* v. *Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973); *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds *sub nom. Richardson* v. *Perales*, 402 U.S. 389 (1971). It is unnecessary to decide whether this line of decisions constitutes a correct application of the collateral order doctrine. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); cf. *Paluso* v. *Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978). Contrary to plaintiffs' suggestion (Alaska Reply Br. in Opp. 4 n.5), neither these cases nor the collateral order doctrine itself supports the conclusion that the November 30 order was final. It is beyond dispute that the remand order was not collateral but rather was inextricably related to the merits of plaintiffs' claim and that the court of appeals could effectively have reviewed the question of the Secretary's power to cancel the STUYVESANT's domestic trade restrictions on appeal from a final judgment entered following the decision on remand.

> the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be. Thus, in the words of *Catlin* v. *United States*, *supra*, the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment * * *.[31]

The Court's decision in *Boston & Maine Railroad* v. *United States*, 358 U.S. 68 (1958), illustrates this point. In that case, a three-judge district court held that the Interstate Commerce Commission had the power to mandate the per diem rate of compensation for use of freight cars by short-haul terminal railroads. The court nonetheless set aside the order on the merits and remanded the case to the Commission

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[31] Respondent Shell suggests (Reply Br. in Opp. 1-2) that the November 30 order conclusively denied it relief because the district court held that the Secretary has the power to rescind a CDS transaction. Thus, respondent argues, even if plaintiffs were to have prevailed on remand they could not have been assured of relief against future STUYVESANT-type transactions. This contention ignores the case and controversy requirement of Article III of the Constitution. If the Secretary had concluded on remand that the STUYVESANT transaction should not go forward, plaintiffs would have had no right to appeal since the dispute presented in *this* case—whether the STUYVESANT may operate in the Alaskan trade—would have been settled in their favor. Plaintiffs have no right to an advisory opinion on the Secretary's power under the Merchant Marine Act. If the Secretary were to decide to enter into a similar agreement (a historically rare occurrence) in the future, plaintiffs would then have the opportunity to challenge that transaction on all relevant grounds, including the Secretary's alleged lack of power.

for plenary consideration of a theretofore unexamined economic (mileage) factor. The terminal railroads sought to appeal the district court's decision regarding the Commission's power, but the Court unanimously dismissed the appeal.[32] The Court noted that appellants' claim for relief might well be satisfied on remand and that "the record now presents what is essentially only 'an interim ruling.'" 358 U.S. at 72. So too here, the district court decided a question of power adversely to plaintiffs, but it remanded for consideration of other factors that could have led to the relief plaintiffs sought. Accordingly, the November 30 order, like the district court's remand order in *Boston & Maine Railroad*, was merely an "interim ruling."

The Court's recent decision in *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, also compels the conclusion that the November 30 order was not a final decision. *Wetzel* involved a Title VII class action seeking injunctive relief, damages, and attorneys' fees for alleged gender discrimination. The district court granted partial summary judgment for plaintiffs, fully resolving the issue of defendant's liability, but it deferred ruling on plaintiffs' claims for relief. Defendants took an immediate appeal, and the court of appeals affirmed, holding that it had jurisdiction

[32] The railroads had appealed the order pursuant to 28 U.S.C. 1253, which provides in relevant part that "any party may appeal to the Supreme Court from an order granting or denying * * * an interlocutory or permanent injunction in any civil action * * * heard and determined by a district court of three judges."

under 28 U.S.C. 1291. This Court *sua sponte* vacated and remanded with instructions to dismiss the appeal because of the absence of a final decision in the district court. 424 U.S. at 742-744. Similarly, the district court's order granting partial summary judgment in this case "finally disposed of none of [plaintiffs'] prayers for relief." *Id.* at 742. Indeed, here, unlike in *Wetzel*, the November 30 order did not even conclusively decide the issue of liability. The district court's decision whether to order injunctive relief clearly depended upon the outcome of the additional proceedings before the Secretary.[33]

Plaintiffs' response to this jurisdictional defect is a citation to *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964),[34] and *Cohen* v. *Beneficial Industrial*

[33] Even assuming that the district court did not retain jurisdiction over this case while the administrative proceedings were ongoing, there is no merit to the argument that the remand order was final because the further proceedings were to occur in an administrative forum rather than in the district court itself. The court of appeals decisions cited above do not purport to depend upon that consideration. See, *e.g.*, *Bachowski* v. *Usery*, *supra*; *Bohms* v. *Gardner*, *supra*. Moreover, this Court has held nonappealable orders that divest a particular district court of jurisdiction and mandate additional proceedings in another forum. See, *e.g.*, *Parr* v. *United States*, *supra* (change of venue); *Schoenamsgruber* v. *Hamburg American Line*, *supra* (arbitration). See also *Boston & Maine Railroad* v. *United States*, *supra*; *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1856) ("A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision.").

[34] In *Gillespie*, the Court found appealable a district court order holding that certain relatives of a deceased employee could not recover under the Jones Act, 46 U.S.C. 688. The

Loan Corp., 337 U.S. 541 (1949),[35] and the assertion that Section 1291 must be given a practical construction (Shell Reply Br. in Opp. 3 n.*; Alaska Reply Br. in Opp. 6-7). Although in a few situations the Court has accorded finality to otherwise intermediate rulings, those isolated decisions have involved district court orders either bearing serious and irremediable consequences or deciding otherwise unreviewable issues separate from the merits of the controversy. See, *e.g.*, *DiBella* v. *United States*, *supra*, 369 U.S. at 127; *Radio Station WOW, Inc.* v. *Johnson*, *supra*, 326 U.S. at 124; *Sears, Roebuck & Co.* v. *Mackey*, 351

Court stressed the "great injustice" to the relatives, whose claims were to a large extent "severable" from the remainder of the suit, in having to wait until the conclusion of the litigation before being allowed to challenge the trial judge's conclusion that they were not entitled to recover as a matter of law. 379 U.S. at 153. Here, of course, the issue of the Secretary's power under Section 506 is not severable from the merits of the case, and plaintiffs would not have suffered any harm in having to await the conclusion of the district court proceedings before seeking appellate review. In any event, *Gillespie* has been criticized as bypassing the mandatory requirements of Section 1292(b) (see Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 613-614 (1975)), and the Court has since limited the case to its "unique facts." *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 477 n.30.

[35] *Cohen* established the collateral order doctrine. As we have already mentioned (see note 30, *supra*), and as plaintiffs acknowledge (Alaska Reply Br. in Opp. 5 n.9), the remand order, which is entwined in the merits of this case and is fully reviewable on appeal from a final decision, is not a collateral order. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468-469.

U.S. 427, 441 (1956) (opinion of Frankfurter, J.); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975). Where, as here, the interlocutory order goes to the heart of the controversy and is fully reviewable upon entry of a final judgment, there is no justification for interlocutory review. See, *e.g.*, *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 746; *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468-469 (order denying certification of class action not final even if ruling spells "death knell" for suit).[33]

2. The final judgment rule is more than a technical, albeit venerable, statutory requirement. As the Court has repeatedly emphasized, important jurisprudential considerations strongly commend the rule's continued vitality and scrupulous application. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 471-476; *Catlin* v. *United States*, *supra*, 324 U.S. at 233-234; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-326. In general, these policy considerations militate against expanding the concept of

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[36] There is no merit to plaintiffs' suggestion (Alaska Reply Br. in Opp. 7) that even if the November 30 order was not final when entered it became final during the course of the appeal because the Secretary on remand adhered to her decision. The district court has never addressed the remand ruling and has never entered a final order. Plaintiffs each filed only one notice of appeal, and the sole basis of that appeal was the November 30 order. See Fed. R. App. P. 3(c) (notice of appeal "shall designate the * * * order * * * appealed from * * *"). Compare *Foman* v. *Davis*, 371 U.S. 178, 181 (1962); *United States* v. *Indrelunas*, 411 U.S. 216 (1973).

finality to encompass a broad spectrum of orders that do not terminate a case. Except perhaps in unique and compelling circumstances not present here (see note 30, *supra*), remand orders particularly should not be considered final and appealable.

Allowing litigants to appeal orders merely remanding a case for further administrative proceedings would unnecessarily tax the already overburdened courts of appeals. See *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473, 475; *Borden Co.* v. *Sylk*, 410 F.2d 843, 845-846 (3d Cir. 1969); 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3907, at 432-433. If, for example, the court of appeals in this case had agreed with the district court—and affirmance is by far the most usual result in an appeal [37]—another panel of the court of appeals would have been required to consider many of the same facts and legal issues on appeal from the district court's judgment following the remand. If, on the other hand, the Secretary on remand had concluded that it was inappropriate to allow the STUYVESANT to operate in the Alaskan trade, there would have been no need for plaintiffs to appeal at all. Moreover, the conclusion that remand orders are appealable not only will result in unnecessary appeals, but it will also deprive the appellate courts of the advantage of evaluating legal questions

[37] See C. Wright, *Law of Federal Courts* § 101, at 452 (2d ed. 1970). In 1978, the reversal rate in the courts of appeals was 17.3%. See *Administrative Office of the United States Courts, 1978 Annual Report of the Director* 48.

in the context of a fully developed record.[38] See 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3907, at 432; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333, 334 (1959).[39]

Furthermore, allowance of interlocutory appeals of remand and other non-final orders as a matter of right would undoubtedly have a substantial adverse impact on the administration of justice at the district court level. Such appeals would significantly interfere with the trial judge's ability to control his calendar, would indiscriminately thrust appellate courts into the trial process, and would dramatically increase the time and expense involved in resolving disputes. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473-476; *Radio Station WOW, Inc.* v. *Johnson*, *supra*, 326 U.S. at 124; *Catlin* v. *United*

[38] Here, for example, the Secretary's finding on remand that the STUYVESANT decision had no discernible effect on the plaintiffs suggests an additional argument on appeal—that the plaintiffs lack standing to bring this suit. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975). Although petitioners and the federal parties argued prior to remand that plaintiffs' complaint failed to allege standing, this argument was strengthened substantially by the factual findings made on remand.

[39] In this case, to be sure, the record developed on remand was available to the court of appeals because of the expedited administrative proceedings. See Pet. App. 18a n. 34. That circumstance will often not be present. In any event, even here the court of appeals lost the benefit of the district court's evaluation of the administrative record developed on remand.

States, supra, 324 U.S. at 233-234; *Cobbledick* v. *United States, supra,* 309 U.S. at 325; *Canter* v. *American Insurance Co., supra,* 28 U.S. (3 Pet.) at 318.[40] The present case is an apt illustration. The district court remanded this case to the Secretary in November 1977 with instructions to resolve the competitive effects issue expeditiously and with the expectation that plaintiffs' request for injunctive relief could be decided promptly upon review of the decision on remand. Plaintiffs' interlocutory appeal has unnecessarily delayed that process. If this Court were to reach the merits of this case and were to reverse the court of appeals' holding that the Secretary is powerless to lift the CDS restrictions permanently, the district court would then have to consider plaintiffs' challenge to the Secretary's findings on remand —more than two years after those findings were made.

In sum, even assuming that increased interlocutory review of non-final orders in some instances might "enhance the quality of justice afforded a few litigants" (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473), the price would be too high to pay. As this Court has noted, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States, supra,* 354 U.S. at 405. See also *United States* v. *MacDonald,* 435 U.S. 850, 857 n.6 (1978). Hence, the "incremental benefit" of advancing an occasional litigation would be far "outweighed by the impact of such an individualized * * * inquiry on the judicial system's overall capacity to administer justice." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473.[41]

[40] Plaintiffs' interlocutory appeal necessitated the filing of yet another suit in the district court to review the Secretary's decision on remand. See note 17, *supra.*

B. The District Court's Invocation Of Rule 54(b) Did Not Render The November 30 Order Appealable Under Section 1291

Prior to the adoption of the Federal Rules of Civil Procedure, only one final decision was possible in any suit, no matter how many unrelated causes of action or how many different parties were involved in the suit. See, *e.g., Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 431-432 (1956); *Collins* v. *Miller,* 252 U.S. 364 (1920); *Hohorst* v. *Hamburg-American Packet Co.,* 148 U.S. 262 (1893). This "single judicial unit" theory of finality sufficed so long as most litigation involved two parties and one cause of action. The liberal federal rules regarding

[41] It is open to conjecture how much benefit, if any, increased interlocutory review would bring to individual litigants. Congress has already provided for appellate review of those interlocutory orders that, because of their substantial and irremediable impact, are most likely to warrant immediate appellate consideration. See 28 U.S.C. 1292; pages 43-48, *infra.* In most other circumstances (including the instant controversy) review following entry of a final order is adequate to protect the litigants' interests. Conversely, interlocutory appeals, if routinely available, would create the potential for one party to win a litigation by simply wearing down a financially weaker opponent. See 15 C. Wright, A. Miller & E. Cooper, *supra,* § 3907, at 432; *Bachowski* v. *Usery, supra,* 545 F.2d at 369.

joinder, interpleader, intervention, and impleader, however, encourage multiple-cause, multiple-party litigation. See *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 432; 10 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2653-2654 (1973). By allowing the entry of a "final judgment as to one or more but fewer than all of the claims or parties," Fed. R. Civ. P. 54(b) permits the district court to alleviate the hardship that might otherwise befall a litigant whose claim or claims have been conclusively determined prior to the termination of the whole case. See, *e.g., Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 511-512 (1950).[42]

Plaintiffs contend that the November 30 order is final and appealable because the district court made the required findings under Rule 54(b). But it is beyond dispute that the district court's categorization of a particular order is not determinative of its finality. See, *e.g., Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 437; *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 274 (2d Cir. 1968); C. Wright, *Law of Federal Courts* § 101, at 454 (2d ed. 1970) (collecting cases). See also *FTC*

[42] For example, suppose A sues B seeking (1) damages for breach of a construction contract and (2) specific performance of an unrelated land sale contract. If the district court grants B's motion for summary judgment regarding claim 2, it might be unfair to make A wait until the end of trial on claim 1 before allowing him to appeal the adverse summary judgment ruling. To avoid this predicament, Rule 54(b) permits the district court to enter a final judgment regarding claim 2 if it expressly finds that "there is no just reason for delay."

v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 212 (1952). A district court may only invoke Rule 54(b) to "finalize" an order that has fully and conclusively terminated a separate and independent claim or cause of action; the rule may not "be employed to permit the appeal of a partial adjudication of the rights of one or more of the parties * * *." 10 C. Wright & A. Miller, *supra,* § 2653, at 27; see 6 *Moore's Federal Practice* ¶ 54.01 [01], at 35-36 (2d ed. 1976); *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 742-743.[43]

Accordingly, the district court's Rule 54(b) certification could not make the November 30 interlocutory order final for purposes of Section 1291. Plaintiffs' complaint asserted only one claim or cause of action arising out of one set of facts: that the Secretary could not lawfully permit the STUYVESANT to sail in the Alaskan trade for more than six months per year.[44] Without question, plaintiffs

[43] Indeed, if Rule 54(b) were construed to allow district courts to confer "finality" on interlocutory orders, it might well be invalid as an expansion of the jurisdiction of the courts of appeals. See 10 C. Wright and A. Miller, *supra,* § 2653, at 28-31; cf. Fed. R. Civ. P. 82; *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 437-438.

[44] Insofar as plaintiffs may suggest that their requests for declaratory and injunctive relief constitute separate claims under Rule 54(b), their contention is squarely foreclosed by *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 743 & n.4. See also *Acha* v. *Beame,* 570 F.2d 57, 62 (2d Cir. 1978); *Zangardi* v. *Tobriner,* 330 F.2d 224, 225 (D.C. Cir. 1964) (declaratory and injunctive relief not separate claims).

asserted alternative legal theories to support their one "distinctly separate claim." [45] But whether the district court finally concluded that the Secretary had no power to lift the Section 506 restrictions generally or only in the circumstances presented here, it would not have affected the relief obtained by plaintiffs in this case. The November 30 order therefore conclusively determined only one of two legal theories supporting plaintiffs' single claim, and it plainly could not be appealed pursuant to Rule 54(b).[46] By the same token, the November 30 order did not completely determine any party's claims, because all parties were

[45] Advisory Committee on Rules for Civil Procedure, Note to Rule 54, 5 F.R.D. 472 (1946). See *Reeves* v. *Beardall*, 316 U.S. 283, 285 (1942) (cited with approval in the Advisory Committee Note).

[46] See, *e.g.*, *Schexnaydre* v. *Travelers Insurance Co.*, 527 F.2d 855 (5th Cir. 1976); *Public Leasing Corp.* v. *Mack Trucks, Inc.*, 16 Fed. R. Serv. 2d 472 (10th Cir. 1972); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F.2d 200, 202 (5th Cir. 1973); *McNellis* v. *Merchants National Bank and Trust Company*, 385 F.2d 916 (2d Cir. 1967); *Baca Land & Cattle Co.* v. *New Mexico Timber, Inc.*, 384 F.2d 701 (10th Cir. 1967); *RePass* v. *Vreeland*, 357 F.2d 801 (3d Cir. 1966); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir.), cert. denied, 375 U.S. 879 (1963); *CMAX, Inc.* v. *Drewry Photocolor Corp.*, 295 F.2d 695 (9th Cir. 1961); see 10 C. Wright and A. Miller, *supra*, § 2656, at 41, & § 2657, at 53; 6 *Moore's Federal Practice*, *supra*, ¶ 54.27 [3], at 332-335. As this Court has explained, Rule 54(b) allows the district court to control the timing of the release of final decisions in multiple-claim actions; it has no application to single-claim actions. See *Sears, Roebuck & Co.* v. *Mackey*, *supra*, 351 U.S. at 435, 438; *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 742-743.

to participate in the remand proceeding. Thus, there was no basis for invoking Rule 54(b), and the district court's erroneous certification did not create appellate jurisdiction under Section 1291.

Finally, the Rule 54(b) certification also failed to satisfy the specific requirements of 28 U.S.C. 1292(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 745-746. Section 1292(b) allows litigants to appeal interlocutory orders in exceptional circumstances. See generally Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333 (1959). In order to avoid a deluge of interlocutory appeals, however, the statute contains three mandatory conditions. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 2 (1958); S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958). None of these conditions was met here.

First, the district court did not expressly certify that its order "involves a controlling question of law as to which there is substantial ground for a difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." [47] Second, plaintiffs did not apply to the court of appeals within ten days of the district court's order for permission to proceed with the interlocutory appeal. See *Liberty Mutual*

[47] The district court's attempted certification under Rule 54(b) stated only that there "is no reason to delay" (A. 559).

Insurance Co. v. *Wetzel*, *supra*, 424 U.S. at 745; Note, *supra*, 69 Yale L.J. at 347; S. Rep. No. 2434, *supra*, at 3. Third, the court of appeals, which may choose not to hear an otherwise properly certified interlocutory appeal for any reason,[48] never exercised its discretion under Section 1292(b) to consider plaintiffs' appeal.

C. The District Court's Order, Which Conclusively Decided Only One Of Two Alternative Legal Theories Supporting A Claim For Injunctive Relief, Was Not Appealable Under 28 U.S.C. 1292(a)(1) As An Order Refusing An Injunction

Plaintiffs also contend (Alaska Reply Br. in Opp. 8; Shell Reply Br. in Opp. 3) that the November 30 order was appealable under 28 U.S.C. 1292(a)(1) as an interlocutory order "refusing * * * [an] injunction[]."[49] But, as we have discussed above (see pages 27-35, *supra*), the district court neither granted nor refused plaintiffs' request for equitable relief. The court merely denied plaintiffs' motion for summary judgment as to one legal theory in support of its claim for an injunction and remanded for further proceedings with regard to plaintiffs'

[48] See Note, *supra*, 88 Harv. L. Rev. at 607.

[49] We do not understand plaintiffs to suggest that they in fact appealed from the district court's order of September 30, 1977, denying their request for a preliminary injunction (see page 12, *supra*). Even assuming that plaintiffs could establish nunc pro tunc "excusable neglect," their notices of appeal would still fall outside the maximum 60-day period allowed by Fed. R. App. P. 4(a). See *George* v. *Victor Talking Machine Co.*, 293 U.S. 377 (1934). See also Fed. R. App. P. 3(c) and note 36, *supra*.

alternative legal theory. Following those proceedings, the district court would have ruled upon the request for an injunction and, in the unlikely event that that decision was not a final order, plaintiffs could then have appealed under Section 1292(a)(1).

As matters now stand, plaintiffs have never given the district court an opportunity to decide conclusively whether an injunction should issue. Hence, for the same reason that the court's order of November 30 is not final within the meaning of Section 1291 because it decided only one of the legal theories underlying a single claim, that order cannot be considered a refusal of injunctive relief within the meaning of Section 1292(a)(1). See, *e.g.*, *Cromaglass Corp.* v. *Ferm*, 500 F.2d 601, 605-609 (3d Cir. 1974) (en banc); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F.2d 200 (5th Cir. 1973); *Marcel Dekker, Inc.* v. *Anselme*, 468 F.2d 607 (1st Cir. 1972); *Western Geophysical Co.* v. *Bolt Associates, Inc.*, 440 F.2d 765 (2d Cir. 1971) (Friendly, J.); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3924, at 80-81 (1977).[50] See also Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 370 (1961):

[50] Nor does the fact that the November 30 order remanded the case for further administrative proceedings regarding plaintiffs' alternative theory in support of injunctive relief render the decision appealable under Section 1292(a)(1). See, *e.g.*, *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 340 F.2d 160 (2d Cir.), cert. denied, 381 U.S. 924 (1965); cf. *Chronicle Publishing Co.* v. *National Broadcasting Co.*, 294 F.2d 744 (9th Cir. 1961).

> If the court dismisses fewer than all of the theories advanced by the plaintiff to justify a permanent injunction, the situation is comparable to the denial of a motion for summary judgment. The court has not precluded the possibility that it will award the full relief sought, and it could, consistently with its prior action, grant a preliminary injunction pending disposition of the remaining counts. For the same reasons, therefore, appeal should be denied.

The Court's analysis in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966), strongly supports this view. In that case, plaintiffs moved for summary judgment seeking injunctive relief and damages. The district court denied the motion on the ground that there were disputed factual issues requiring a trial. Plaintiffs immediately appealed under Section 1292(a)(1), but the court of appeals dismissed for lack of jurisdiction. This Court affirmed the dismissal, noting that the order in question did not "settle * * * the merits of the [injunctive] claim." 385 U.S. at 25. The November 30 order remanding the case for further proceedings before the Secretary likewise failed to settle the merits of plaintiffs' claim for injunctive relief. See also *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (denial of class action certification not appealable); *Goldstein* v. *Cox*, 396 U.S. 471 (1970).[51]

[51] *Goldstein* is particularly instructive. The three-judge district court in that case denied the plaintiffs' motion for summary judgment on the issue whether the New York statute in question was unconstitutional on its face, but it did not dismiss the complaint because plaintiffs also asserted that the statute was unconstitutional as applied. Plaintiffs appealed to this Court under 28 U.S.C. 1253, which, like Section 1292(a)(1), requires "an order * * * denying * * * an * * * injunction." The Court dismissed the appeal, finding that the district court's order had neither conclusively determined the claim for permanent injunctive relief nor addressed plaintiffs' claim for a preliminary injunction. Here, too, the district court rejected plaintiffs' broad statutory attack on the Secretary's actions, but it reserved judgment on the question whether the Secretary had acted unlawfully in the circumstances of this case.

Plaintiffs' attempt to stretch Section 1292(a)(1) to cover this situation squarely conflicts with the policies that underlie that provision. Section 1292(a)(1) constitutes a narrow exception to the finality rule that is keyed to the litigants' need for immediate review of interlocutory orders bearing serious and often irreparable consequences. *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 480; *Baltimore Contractors, Inc.* v. *Bodinger*, *supra*, 348 U.S. at 181. The November 30 order posed no threat of irreparable harm[52] and decided an issue that could be fully and effectively reviewed upon the district court's entry of a final decision. In these circumstances, it is inappropriate and unwise to expand the reach of Section 1292(a)(1), particularly since every such expansion undermines the final

[52] That the court's interlocutory decision did not threaten plaintiffs with immediate injury is evidenced by their failure to appeal the district court's denial of their motion for a preliminary injunction. Plaintiffs' ships are fully employed in the Alaskan trade and, given the conditions of that market (see page 13, *supra*), will continue to be employed in the foreseeable future.

judgment rule and threatens the courts of appeals with a "floodgate" of interlocutory appeals. See *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 480-482; *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, *supra*, 385 U.S. at 24; *Chappell & Co.* v. *Frankel*, 367 F.2d 197, 202-205 (2d Cir. 1966) (en banc).

II.

THE MERCHANT MARINE ACT, 1936, AUTHORIZES THE SECRETARY OF COMMERCE TO RELIEVE A VESSEL THAT HAS RECEIVED A FEDERAL CONSTRUCTION SUBSIDY FROM THE TRADE RESTRICTIONS IMPOSED BY SECTION 506 OF THE ACT IN EXCHANGE FOR FULL REPAYMENT OF THE SUBSIDY

If the Court rejects the government's jurisdictional submission, it must then address the merits of this case. The question raised is whether the Secretary may relieve a vessel that has received a construction-differential subsidy of the trade restrictions imposed by Section 506 of the Act in return for full repayment of that subsidy. The court of appeals held that Section 506 impliedly precludes the Secretary from entering into such a contract despite the broad contractual powers vested in her by other provisions of the Act. But Section 506 does not require the Secretary to stand helplessly by while a new CDS-financed oil tanker lies idle and consequently defaults on millions of dollars of government guaranteed loans. Rather, the structure, legislative history and policy of the Act make clear that the Secretary has power to undo or modify a CDS transaction in order

to achieve the purposes of the Act or other important national goals. In reaching a contrary conclusion, the court of appeals incorrectly rejected a consistent and reasonable administrative interpretation that has been approved by Congress on at least two occasions.

A. Section 506 Does Not Bar The Secretary From Exercising Her Broad Powers Under The Act To Permit The STUYVESANT To Operate In The Domestic Trade On Repayment Of The CDS

1. The Merchant Marine Act grants the Secretary broad contractual authority to carry out the Title V (CDS) program. See 46 U.S.C. 1151, 1152, and 1154. Unless otherwise restricted, such authority necessarily includes the power to rescind or modify CDS contracts as well as to enter into them. See, *e.g.*, *General Dynamics Corp.* v. *United States*, 558 F.2d 985, 990 (Ct. Cl. 1977); *Nyhus* v. *Travel Management Corp.*, 466 F.2d 440 (D.C. Cir. 1972). "When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580 (1963). See also *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Particularly where, as here, the contract modification effectuates the express policy of the Act to encourage maximum usage of American owned and operated vessels,[53]

[53] See 46 U.S.C. 1101. Section 504 of the Act provides that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. 1154. See generally pages 71-73, *infra*.

there is no justification for construing the Secretary's contractual authority in a grudging or restrictive fashion. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-779 (1968); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 255 (1945).

The conclusion that the Secretary is empowered to modify a CDS contract does not rest on her general contractual powers alone. Under Section 207 of the Act, 46 U.S.C. 1117, the Secretary has discretion to "enter into such contracts, upon behalf of the United States * * * as may * * * be necessary to carry on the activities authorized by this chapter, or *to protect, preserve,* or *improve the collateral held by the Commission or Secretary to secure indebtedness*, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter" (emphasis supplied). Here, the STUYVESANT constituted a $27.2 million CDS program investment in an operational American merchant marine and also served as collateral for $30.2 million in government-guaranteed loans under Title XI of the Act. See page 8 & note 2, *supra*. Because of the substantial probability that the STUYVESANT would default on those loans (as well as on $40 million in additional loans 90% guaranteed by the Department of Commerce through the EDA)[54] if it

[54] See page 7 & note 11, *supra*. The total allocated construction cost of the STUYVESANT was $102.7 million. The source of these funds was (Pet. App. 8a-9a; A. 113, 542-550):

Construction-differential subsidy	$ 27.2 million
Loans guaranteed by Secretary of Commerce pursuant to Title XI	30.2 million
Loans guaranteed by EDA	40.0 million
Other funds	5.3 million
Total construction cost	$102.7 million

could not operate in the Alaskan trade, Section 207 specifically empowered the Secretary to modify the CDS contract to avoid the government's foreclosing on useless collateral.

Thus, unless some provision of the Act unequivocally withdraws the Secretary's authority to modify CDS contracts upon repayment in full of the CDS, Section 207 and the Secretary's general contractual powers constitute sufficient authority for the STUYVESANT transaction. A divided court of appeals erroneously concluded that Section 506 of the Act implicitly overrides the Secretary's broad powers under the Act. We now turn to that contention.

2. As a condition of receiving a $27.2 million CDS, petitioners promised to operate the STUYVESANT during its 20-year useful life as an American flag vessel in the foreign trade. Because CDS-financed vessels enjoy a substantial advantage over the unsubsidized domestic fleet,[55] Section 506 limits the circumstances under which such vessels may operate in the domestic trade: they may sail between

[55] The domestic fleet needs no subsidies because only American flag ships may operate in the domestic trade, whereas vessels sailing in the foreign trade compete against foreign merchant marines that generally have lower construction and operating costs. See 46 U.S.C. 883; pages 3 & 8, *supra*.

American ports only (1) as an adjunct to a foreign voyage or (2) for up to six months in any 12-month period, but only on the express consent of the Secretary. Section 506 further provides that whenever a CDS-financed vessel operates in the domestic trade it must repay a pro rata portion of the CDS. See page 6 & note 10, *supra*.

It is thus apparent that Section 506 is concerned solely with the extent and conditions of competition between the unsubsidized domestic fleet and ships that continue to enjoy the benefits of CDS financing. See H.R. Rep. No. 1029, 88th Cong., 1st Sess. 2 (1963). Although the pro rata CDS repayment requirement diminishes the competitive edge enjoyed by CDS-financed vessels, it cannot eliminate entirely the significant financial advantage held by a ship that still retains the benefit of a federal subsidy, because of the subsidized ship's overall smaller indebtedness.[56] Accordingly, Section 506 sets limits on the extent of domestic trading that a CDS-financed vessel may undertake. The section unquestionably prohibits the Secretary from allowing a subsidized vessel to operate in the domestic market for more than six months in a year.

[56] Assume, for example, that identical tankers each cost $100 million, but one (Tanker X) is built with a $50 million CDS while the other (Tanker Y) receives no subsidy. Assume further that the debt service for both ships is 10% per annum and that the Secretary has authorized Tanker X to sail in the domestic trade during its first six months at sea. Tanker X will have a substantial financial advantage over Tanker Y during this period despite the mandatory CDS repayment. Tanker X's financial costs during the six-month period will be $2.5 million (5% of $50 million) debt service plus $1.25 million (1/2 X 1/20 X $50 million) CDS repayment, or $3.75 million total, whereas Tanker Y will incur $5 million (5% of $100 million) in debt service.

But nothing in the language or logic of Section 506 suggests that the provision was intended to impose trade restrictions on a vessel that no longer retains the benefits of a CDS. Contrary to plaintiffs' contention, Section 506 does not permanently and irrevocably taint a ship built or reconstructed with CDS financing. Despite Section 506, for example, a CDS-financed ship that has operated in the foreign trade for its statutory useful life and has therefore fully amortized its CDS may thereafter be transferred to a foreign registry[57] or may operate exclusively in the domestic trade. See Decision No. B-155039, 44 Comp. Gen. 180, 183-184 (1964); H.R. Rep. No. 1029, *supra*, at 2, 5; S. Rep. No. 474, 88th Cong., 1st Sess. 2 (1963); 109 Cong. Rec. 18752 (1963) (remarks of Sen. Magnuson); note 67, *infra*.[58] And just as clearly, in our view, Section 506 does not control the trade opportunities of a vessel that has repaid its CDS in full. In other words, at the moment that petitioners repaid the subsidy, it was as if they had built the STUYVESANT without a CDS. By relinquishing its entire CDS, the STUYVE-

[57] Transfer of an American flag vessel to a foreign registry requires the approval of the Secretary. See 46 U.S.C. 808, 1181.

[58] Pub. L. No. 88-225, 77 Stat. 469, makes clear that the basis for repayment of the CDS is the undepreciated portion of the subsidy and that when the subsidy is fully amortized no repayment is required. See 46 U.S.C. 1125 Note.

SANT lost completely the financial advantage enjoyed by CDS-financed ships temporarily operating in the domestic trade.[59] The STUYVESANT transaction thus is significantly different from the kind of temporary transfers addressed by Section 506.

Plaintiffs, recognizing that Section 506 does not apply to ships that are not subsidized and that it was not enacted to limit competition within the domestic fleet, strain to show that the STUYVESANT continues to benefit from its erstwhile federal financing. They contend that the language of Section 506 should be stretched to encompass the STUYVESANT's circumstances because its initial receipt of CDS financing enabled petitioners to speculate on the world tanker market at the government's expense. There is no support in the record for this speculation. Since 1936 the Secretary has released a vessel from its Section 506 restrictions on only a handful of occasions. It is thus most unlikely that petitioners participated in the CDS program on the assumption that they would be permitted to obtain a permanent release at some future date.[60] Indeed, because the STUYVESANT was

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[59] See note 56, *supra*. Petitioners did have interest-free use of the CDS money between 1972 and 1977. Although the Secretary previously concluded that this advantage was de minimis and that she is not statutorily required to recoup the interest (A. 592-596), she has now decided to seek a reasonable amount of interest for that period if the Court upholds her power to enter into the CDS transaction.

[60] Needless to say, if in a particular case the evidence showed that the owners of a vessel applied for a CDS with the expectation of repaying the subsidy and transferring to

built to operate in the foreign trade, it is possible that the ship will be at a slight competititive disadvantage in the domestic trade because its construction entailed more expensive features required for transoceanic sailing.[61]

In short, the net effect of the STUYVESANT transaction is that an unsubsidized vessel has entered the domestic market. Section 506 was not meant to control the trading opportunities of such a vessel or to stifle increased competition among unsubsidized ships in that market.

B. The Legislative History Of The Merchant Marine Act Demonstrates That Congress Intended To Allow The Secretary To Relieve A Vessel Of The Section 506 Trade Restrictions On Repayment Of The CDS

1. *The Original Act.* The Merchant Marine Act, 1936, was the product of dissatisfaction with prior federal programs designed to encourage development of a modern merchant marine in this country.[62] In March 1935, President Roosevelt sent a message to

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the domestic trade, that would be a substantial factor for the Secretary to consider in determining whether to approve the transaction.

[61] For example, ships built for overseas voyages might be equipped with larger or special appliances unnecessary for operations in the domestic trade.

[62] The low interest loan and ocean mail contract programs of the Merchant Marine Act of 1928, ch. 675, 45 Stat. 689, had been badly and corruptly administered and had had no cognizable effect on the construction of new merchant ships to replace the obsolete fleet left over from World War I. See S. Rep. No. 898, 74th Cong., 1st Sess. 3-36 (1935); H.R. Doc. No. 118, 74th Cong., 1st Sess. 3-19 (1935) (Report of the Postmaster General).

Congress outlining the problems of the existing fleet and urging new legislation to ensure an adequate merchant marine. H.R. Doc. No. 118, 74th Cong., 1st Sess. 1-3 (1935). Following an extensive investigation, a special Senate committee led by Senator Hugo Black reported its findings and recommendations. See generally S. Rep. No. 898, 74th Cong., 1st Sess. (1935). The Black Report called for a program of construction subsidies to be paid directly to American shipyards in order to equalize construction costs in the United States with the otherwise lower costs in foreign shipyards. *Id.* at 43-44. It further recommended that no subsidized vessel be permitted to operate in the domestic trade

> except with the consent of the agency, and the agency should specifically be denied authority to consent to such operation until there shall have been repaid an amount which bears the same proportion to the construction subsidy theretofore paid as the remaining economic life of the vessel bears to its entire economic life.[63]

Id. at 44.[64]

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[63] Between 1936 and 1950, an independent agency (the United States Maritime Commission) administered the CDS program. Since 1950 the Department of Commerce through the Maritime Administration has run this program. The legislative history therefore contains varying references to the operating authority of the subsidy program. For clarity, we consistently refer to "the Secretary" rather than to the various agencies.

[64] Similarly, President Roosevelt's Committee on Shipping Policy recommended enactment of a subsidy program, "but if such [subsidized] ships are entered in the [domestic] trade, the owner should be required to reimburse the Government pro rata based on the life of the ship." H.R. Doc. No. 118, *supra*, at 22.

The events leading to the passage of the 1936 Act reflect Congress' acceptance of the Black Report's recommendation regarding the repayment of construction subsidies. In April 1935, identical bills were introduced in the Senate and the House of Representatives, expressly providing that ships that had received construction subsidies could permanently operate in the domestic market upon pro rata repayment of the subsidy. S. 2582, 74th Cong., 1st Sess., Section 504, 79 Cong. Rec. 5617, 5620 (1935); H.R. 7521, 74th Cong., 1st Sess., Section 504, 79 Cong. Rec. 5721 (1935). The House subsequently passed an amended version of the bill, which also provided for a proportional repayment of the subsidy as a condition of operating in the domestic trade without restrictions. H.R. 8555, 74th Cong., 1st Sess., Section 506 (1935). See 79 Cong. Rec. 10288, 10289 (1935); H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935). The Senate, however, failed to approve this version, apparently in part because the bill as drafted too easily permitted the temporary transfer of subsidized vessels to and from the domestic market. See S. Rep. No. 1721, 74th Cong., 2d Sess. 15 (1936); H.R. Rep. No. 1277, *supra*, at 35 (minority views); *Proposed Merchant Marine Act, 1935: Hearings on S. 2582 Before the Senate Comm. on Commerce*, 74th Cong., 1st Sess. 151-152 (1935); *Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110,*

and S. 4111 Before the Senate Comm. on Commerce, 74th Cong., 2d Sess. 57-58 (1936).

The following year, Senators Copeland and Guffey introduced new bills designed to permit permanent transfers to the domestic market in exchange for pro rata repayment of the subsidy but to limit the extent of temporary domestic trading that could be carried on by subsidized vessels. S. 3500, 74th Cong., 2d Sess., Section 506 (1936); S. 4110, 74th Cong., 2d Sess., Section 27 (1936). See 80 Cong. Rec. 48, 2900, 4367 (1936). As Senator Guffey explained:

> Section 27 * * * prohibits the operation of a vessel constructed with the aid of a subsidy for foreign service to be operated jointly in the foreign service and in the intercoastal service. Provision is made, however, for the transfer of such vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy. This section also provides that the Commission may permit the transfer of a vessel constructed for the foreign service with the aid of a subsidy to the intercoastal service temporarily, for a period not to exceed 3 months, provided an actual emergency exists.

Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Comm. on Commerce, 74th Cong., 2d Sess. 133 (1936); see also *id.* at 124 (explanation of Sen. Copeland's bill).

Congress essentially adopted Senator Guffey's proposal as Section 506 of the Merchant Marine Act, 1936. Section 506 as originally enacted allowed emergency transfers of subsidized vessels to the domestic trade for up to three months. It also allowed permanent transfers, conditioned on the vessel owner's agreement to pay "an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid * * * as the remaining economic life of the vessel bears to its entire economic life" (ch. 858, Section 506, 49 Stat. 1999).[65]

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[65] Section 506, as originally enacted, provided:

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unles the owner of such vessel shall receive the written consent of the [Maritime] Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding costs of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no

Hence, the Act as passed in 1936 expressly authorized the kind of transaction challenged here.

2. *The 1938 Amendments.* Although Section 506 of the 1936 Act clearly provided that a subsidized vessel could operate permanently in the domestic trade on repayment of the unamortized portion of its subsidy, the section was ambiguous with regard to whether the temporary transfer of such a vessel to the domestic trade also required a proportional subsidy repayment. Accordingly, in 1938 Congress amended Section 506, producing essentially the current version of that statute. See ch. 600, Section 18, 52 Stat. 958. The new Section 506 extended the maximum period of temporary domestic operations to six months and eliminated the requirement that such trading be predicated on the existence of an emergency. The amended version also removed the uncertainty that had arisen under the original Section 506 by requiring a pro rata repayment of the subsidy whenever a CDS-financed vessel operates in the domestic trade.

Unfortunately, in clarifying the latter point, the 1938 amendments also deleted the language that expressly authorized permanent domestic trading by a vessel that had repaid its unamortized CDS. Relying on the ambiguous statement of a single witness at a congressional hearing on the proposed amendments, a majority of the court of appeals concluded that this omission reflected Congress' intent

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operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

to preclude the Secretary under any circumstances from permanently releasing a vessel from the trade restrictions imposed by Section 506 (Pet. App. 24a-27a). However, other portions of the legislative history accompanying the 1938 amendments demonstrate that the deletion was inadvertent and that Congress did not intend to limit the Secretary's power in this regard.

The statement primarily relied on by the court of appeals was made by Chairman Joseph P. Kennedy of the United States Maritime Commission. Chairman Kennedy testified before a House Committee that "Section 506 has been entirely rewritten to remove ambiguities and confusion" in the 1936 language. *Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Comm. on Merchant Marine and Fisheries*, 75th Cong., 2d & 3d Sess. 8 (1937). Chairman Kennedy then outlined in general terms the existing and proposed statutes, alluding to the new provision requiring a pro rata CDS repayment in case of a temporary transfer but never once directly addressing the Secretary's power to release a subsidized ship from its trade restrictions on a permanent basis. *Id.* at 8-9. Thus, there is no warrant for the court of appeals' conclusion that the ambiguity to which Chairman Kennedy referred involved the question of permanent waivers. Indeed, that conclusion is particularly unjustified because the original version of Section 506 contained no ambiguity concerning *permanent* CDS releases—it explicitly allowed them and explicitly required repayment of the unamortized construction subsidy—

whereas the statute contained an obvious ambiguity with regard to pro rata repayments in the case of *temporary* emergency releases.[66]

This assessment of Chairman Kennedy's testimony and the intent of Congress in passing the 1938 amendments is bolstered by the legislative reports on the amendments, which explain that the changes in Section 506 merely clarified the conditions of temporary transfers to the domestic service and that "[n]o fundamental change in the original purpose of [Section 506] has been effected." H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938); see S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938). See also note 66, *supra*. In light of the clear language and legislative history of the original Section 506, which empowered the Secretary to allow a subsidized vessel to operate permanently in the domestic trade in exchange for repayment of the CDS, it is exceedingly unlikely that Congress would have eliminated that power without extended comment, much less that it would have described such a change as not "fundamental."

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[66] Furthermore, at least one industry spokesman did not share the view ascribed to Chairman Kennedy by the court of appeals that amended Section 506 would drastically limit the domestic trading opportunities of a subsidized vessel. See *Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Comm. on Merchant Marine and Fisheries, supra,* at 105-106; and *Amending the Merchant Marine Act of 1936: Hearings on S. 3078 Before the Senate Comms. on Commerce and Education and Labor,* 75th Cong., 2d Sess. 44 (1937) (recommending that Section 506 be amended to prohibit all domestic trading by both "subsidized vessels and vessels which have at any time been subsidized.").

Finally, the court of appeals' reading of the 1938 amendments of Section 506 is further refuted by Congress' simultaneous amendment of Section 207 of the Act to emphasize the Secretary's broad contractual powers under that provision, particularly where the government's interest in collateral is at risk. See S. Rep. No. 1618, *supra*, at 4-5; H.R. Rep. No. 2168, *supra*, at 17. The House Report confirms that, "[u]nder the Act, the Maritime Commission has all the general and implied powers of a business corporation" (*ibid.*). It is difficult to accept the notion that Congress in 1938 meant to enhance the Secretary's contractual powers to accomplish the goals of the Act while simultaneously (and without comment) intending to strip the Secretary of the basic authority to amend or terminate CDS contracts when conditions warranted such action.[67]

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[67] Additional support for the government's position may be gleaned from the legislative history of the 1963 amendments to the Act. In response to a bill that would have expressly declared that Section 506 did not limit the trading opportunities of a subsidized ship beyond its statutory useful life, the Department of Commerce informed Congress that even under the original Section 506 "the obligation to repay construction differential subsidy for operation in domestic trade was intended to be, and should be, terminated at the end of the economic lives of the vessels." *Coast Guard, Subsidy Refunds and Extra Costs of Allocation of Vessel Construction Contracts: Hearings on S. 1036, S. 1194, S. 1263 and S. 1172 Before the Senate Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce,* 88th Cong., 1st Sess. 59 (1963); *Legislative Proposals of the Subsidized Lines: Hearings on H.R. 83, H.R. 6814, H.R. 82, H.R. 3117 and H.R. 6813 Before the House Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 88th Cong., 1st Sess. 118 (1963). The proposed section

C. The Elimination Of Domestic Trade Restrictions In Return For Repayment Of The CDS Is Supported By The Secretary's Consistent Construction Of The Act, Which Has Been Approved By Congress

It is a basic principle of statutory interpretation that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Secretary has consistently interpreted the Act as conferring authority to enter into STUYVESANT-type transactions. This interpretation, as demonstrated above, is supported by the language and the legislative history of the statute, and the court of appeals therefore erred in failing to defer to it. The court's substitution of its views for that of the Secretary is particularly inappropriate because Congress has indicated its awareness and approval of the administrative construction of the Act on a number of occasions and, indeed, has passed subsequent legislation based on that construction. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581

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was deleted from the final bill (Pub. L. No. 88-225, 77 Stat. 469 (1963)) on the understanding that Section 506 did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized. See 109 Cong. Rec. 18752 (1963) (remarks of co-sponsor Sen. Magnuson); H.R. Rep. No. 1029, 88th Cong., 1st Sess. 2, 5 (1963); S. Rep. No. 474, 88th Cong., 1st Sess. 2 (1963). See also H.R. Conf. Rep. No. 91-1555, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. 63 (1970).

(1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-382.

1. *The Administrative Construction.* The question of permanently relieving a ship of its CDS restrictions first arose in 1964. At that time, Grace Line, Inc., petitioned the Secretary for leave to operate two of its vessels in the domestic trade conditioned on repayment of the unamortized portion of the vessels' CDS.[68] The Acting General Counsel of the Maritime Administration issued an opinion stating that a vessel could in effect accelerate its reentry into the domestic trade upon expiration of its statutory useful life by repaying its subsidy and that Section 506 did not preclude such a transaction (A. 350-358). The Secretary then requested the views of the Comptroller General. In September 1964, the Comptroller General concurred in the conclusion that, if the Secretary consents, a subsidized vessel may operate permanently in the domestic trade as long as it has repaid

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[68] The two vessels had been converted from cargo to container ships with the aid of a CDS in 1958. Because the CDS program applies to both construction and reconditioning of American flag vessels (see note 3, *supra*), there is no statutory basis for the court of appeals' distinction between the *Grace Line* case and the circumstance of the STUYVESANT (Pet. App. 30a-31a). As we discuss below (see pages 73-75, *infra*), the court's suggestion that subsidized construction somehow differs from subsidized reconditioning with regard to the investment decisions of domestic shipbuilders is unrealistic and misconstrues the policies of the Act. We note here, however, that under plaintiffs' theory of the case a putative shipbuilder in 1958 would have been equally "misled" as to the future operations of the Grace Line vessels whether those vessels were constructed or reconstructed under the CDS program.

the unamortized portion of its subsidy. Decision No. B-155039, 44 Comp. Gen. 180 (1964). The Comptroller General found that a release-repayment transaction would not violate the letter or the spirit of Section 506 because the owner of the vessel would then be "in the same position as if he had paid the full domestic price of the vessel." *Id.* at 184.

The Secretary has subsequently adhered to the *Grace Line* decision in a number of instances, including, of course, the case of the STUYVESANT. In 1976 and 1977, for example, the Secretary conditionally approved the operation of two vessels in the domestic trade upon repayment in full of their CDS (A. 165).[69] And in 1977, the Secretary accepted a CDS repayment from two other vessels then under construction so that those vessels could operate exclusively between two foreign countries, operations otherwise barred by Section 506 (A. 165). In sum, although the authority has been rarely invoked, the Secretary and her predecessors have consistently concluded that they have the power to modify or terminate a CDS contract (including the trade restrictions imposed by Section 506) in exchange for repayment of the unamortized portion of the CDS.[70]

[69] The condition never arose, however, because the Virgin Islands trade in which those vessels operated was held to be foreign commerce in *American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). See 46 U.S.C. 877.

[70] The court of appeals erroneously relied (Pet. App. 32a-33a) on a 1970 legal memorandum of the General Counsel of the Maritime Administration (A. 359-363) to establish an inconsistency in the administrative construction of the Act. That memorandum recommended against including an automatic waiver provision in a CDS contract so as not to bind a future exercise of discretion by the Secretary and the Maritime Subsidy Board. The opinion does not suggest that the Secretary, in appropriate circumstances, lacks power to release a vessel from the Section 506 restrictions; it merely counsels against an advance agreement to allow an automatic release. The memorandum's concern with future exercises of such power clearly reflects the view that the Secretary may enter into STUYVESANT-type transactions, in return for adequate consideration, in order to accomplish the purposes of the Act.

2. *Congressional Approval.* Congress has expressly ratified the Secretary's construction of the Act on several occasions. Most notably, in 1972 Congress amended Title XI of the Act, 46 U.S.C. 1271 *et seq.*, to provide that the Secretary could issue bonds and guarantee private financing that aids in "the repayment to the United States of any amount of construction-differential subsidy * * *." Federal Ship Financing Act of 1972, Pub. L. No. 92-507, Section 1104 (a)(3), 86 Stat. 911, 46 U.S.C. 1274(a)(3). The bill as originally introduced authorized the Secretary to finance

> the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions * * *.

H.R. 9756, 92d Cong., 1st Sess., Section 3 (1971). See also *Merchant Marine Miscellaneous Part 2: Hearings on Ship Mortage Insurance H.R. 9756 Before the House Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 225, 228 (1971). Thereafter, the Department of Commerce informed Congress that although the Secretary could arrange a permanent release from the trade restrictions of Section 506 on repayment of the unamortized CDS, such a transaction had occurred only once before. The Department therefore recommended that the proposed statute be amended to allow Title XI financing for the repayment of a CDS occasioned by either a temporary or a permanent transfer to the domestic service. See *id.* at 219; H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 17 (1971).

Congress subsequently enacted the bill in accordance with the Department's suggestions. See 46 U.S.C. 1274(a)(3), 1274(b)(2). Referring to the *Grace Line* decision, the House Report clearly explains that the bill was intended to facilitate CDS repayments in the event of temporary domestic trading as well as in the more unusual circumstances of permanent releases. See H.R. Rep. No. 92-688, *supra*, at 9-10.[71] See also S. Rep. No. 92-1137, 92d

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[71] The House Report states:

> Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act.

[72] See also 46 U.S.C. 1274(b)(2), which provides that the guarantee may not exceed 87½% of the actual cost of the ship in the case of domestic vessels or vessels that were "built with the aid of construction-differential subsidy and said subsidy has been repaid * * *."

[73] Even prior to 1972, Congress had at least implicitly approved the Secretary's construction of the Act. In accordance with the Reorganization Act of 1949, ch. 226, 63 Stat. 203, the President delivered Reorganization Plan No. 21 of 1950, 64 Stat. 1273, to Congress for its approval. (That is, such a plan may be vetoed by either House within 60 days

Cong., 2d Sess. 9 (1972); 118 Cong. Rec. 2902 (1972) (remarks of Rep. Garmatz).[72] Congress thus not only adopted the Secretary's construction of the Act, but it also passed legislation based in part on that construction.[73]

Moreover, just last year Congress again confirmed that a subsidized vessel may repay its CDS in order to operate permanently in the domestic trade. Congress amended the Merchant Marine Act to extend Title XI guarantees to the slower domestic fleet ships that ply the Great Lakes. See Pub. L. No. 95-505, 92 Stat. 1755. The House Report on the amendment described the Great Lake vessels as ones that are "nonsubsidized (or [have] repaid a construction-differential subsidy)." See H.R. Rep. No. 95-1528, 95th Cong., 2d Sess. 2 (1978).[74] The Report also remarked, without a note of disagreement, that:

> the Department of Commerce not only supported enactment of [the bill] to extend the eligibility for [Title XI] guarantees to Great Lake vessels constructed without construction-differential subsidy (CDS) *or constructed with CDS that has*

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of receipt). Plan No. 21 specifically transferred "[t]he functions with respect to making, amending, and *terminating* subsidy contracts * * * under the provisions of Titles V, VI and VIII * * * of the Merchant Marine Act, 1936" to the Federal Maritime Board (64 Stat. 1274) (emphasis supplied). See also Reorganization Plan No. 7 of 1961, 75 Stat. 840, 842 (transferring same functions to Maritime Administrator).

[74] The court of appeals suggested (Pet. App. 45a) that the 1972 amendments did not constitute congressional ratification of the Secretary's position because a vessel might repay its CDS for reasons other than a desire to operate in the domestic trade. That argument ignores Congress' express reference to *Grace Line* and the clear language of Section 1274(b)(2), see note 72, *supra*. In any event, the 1978 amendments clearly involve repayment for the purpose of operating in the domestic trade, and Congress then reiterated its belief that such transactions are lawful under the Act.

> *been repaid*, but would have no objection to an amendment to section 1104(b)(2) that would make the [Title XI] guarantees available to all vessels constructed without CDS *or with CDS that has been repaid.*

Ibid. (emphasis supplied).

In sum, given Congress' repeated understanding and acceptance of the Secretary's view of the Merchant Marine Act, the court of appeals was justified in departing from that interpretation only if the language or legislative history of the Act unequivocally demonstrated that the Secretary is powerless to modify or terminate a CDS contract. Because the language and legislative history of the original Act and the 1938 amendments cannot bear that burden, and indeed strongly suggest that Congress intended to allow reverse-CDS transactions, the court of appeals erred.

D. The STUYVESANT Transaction Accords With The Policies Of The Merchant Marine Act

Congress has declared that the overriding purpose of the Merchant Marine Act is to foster the development and maintenance of an American merchant marine fleet built by domestic shipyards and operated by American crews. See 46 U.S.C. 1101; H.R. Rep. No. 1277, *supra*, at 1, 17-20. The holding of the court of appeals undermines those policies. It will force an American flag vessel to remain idle and guarantee that its shipyard ceases operations.[75] As

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[75] Subsequent to the Secretary's decisions in this case, the shipyard closed its operations at least temporarily. See *N.Y.*

a result, employment opportunities for American seamen and shipyard employees will be significantly reduced. Moreover, the decision below will undoubtedly diminish the attractiveness of the CDS program,[76] thereby ultimately limiting the overall amount of American shipbuilding and, consequently, this country's military, economic, and political strength. See H.R. Doc. No. 118, *supra*, at 1-3 (address of Pres. Roosevelt); H.R. Rep. No. 1277, *supra*, at 1-4, 11-13.

Furthermore, the court of appeals' decision conflects with Congress' desire to ensure a viable merchant marine in the United States by giving the administrator of the Act

> a considerable amount of discretion in the solution of its problems. This discretion is necessary since many questions will require prompt treatment. Shipping is a business of a highly competitive and constantly changing nature * * *.

Times, May 9, 1979, Section A, at 1. Plaintiffs, however, have never contested the Secretary's finding that "failure to approve the [STUYVESANT's application] would jeopardize continued operation of the Seatrain Shipbuilding Corporation" (A. 34) The Secretary's action was in accordance with Congress' intent that she "take into consideration the conditions of unemployment and the needs and requirements of all shipyards in the country * * *." H.R. Rep. No. 2168, *supra*, at 11; see also *id.* at 19.

[76] The distinct possibility, in light of the court of appeals' ruling, that a vessel, once subsidized, will be denied available employment in the domestic trade and will be forced to default on its loans necessarily lessens the appeal of the CDS program.

S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935). See *States Marine International, Inc.* v. *Peterson, supra*, 518 F.2d at 1079. The existence of an energy crisis in this country (indeed the world) is news to none. Yet, despite the Secretary's finding that there is insufficient tonnage in the Alaskan oil trade (A. 566-599), plaintiffs urge the Court to hold that the Secretary is powerless to transfer to the Alaskan service a large, modern tanker that has repaid its CDS in full. In addition, plaintiffs and the court of appeals have ignored the Secretary's duty under Section 207 of the Act to protect the government's direct financial interests—here, over $100 million.[77]

Despite these considerations, the court of appeals stated that the STUYVESANT transaction posed a "risk of harm to the overall and long-term policies of the Merchant Marine Act" (Pet. App. 49a). In the court's view, the Act creates two immutably sepa-

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[77] The government granted a $27.2 million CDS to the STUYVESANT and a $5 million (EDA) loan to petitioners. In addition, the Department of Commerce through the Maritime Administration and the EDA guaranteed a total of $112.2 million in other loans in connection with the STUYVESANT and the Brooklyn Navy Yard conversion. See pages 7-8 and note 54, *supra*. Respondent Shell has erroneously suggested (Br. in Opp. 11) that the government has no financial interest in these transactions because of guarantees by Seatrain Lines, Inc., petitioners' parent company. The government is unaware of any such guarantees regarding the STUYVESANT loans, and the record discloses none. Indeed, the Secretary specifically found that the STUYVESANT transactions were necessary to protect the government's financial interests, and plaintiffs never disputed that finding during the administrative proceedings or in the district court (A. 34 and 570 n.5).

rate fleets, one operating in the domestic trade and one in the foreign, and "[p]ayment of the subsidy stamps indelibly the character of the ship then and thereafter" (Pet. App. 14a) and marks "the vessel's permanent dedication to U.S. foreign trade" (*id.* at 16a). But Congress has repeatedly declined to create absolute barriers between unsubsidized and subsidized ships despite the requests of domestic shipping companies. See, *e.g.*, note 66, *supra*. To the contrary, Congress has clearly provided that subsidized vessels may operate in the domestic trade temporarily and on complete amortization of the CDS. Moreover, although we do not dispute that Section 506 sets limits upon the duration of competition between subsidized and unsubsidized vessels, the STUYVESANT is no longer subsidized, and its operation in the Alaskan trade cannot reasonably be described as unfair.[78]

Nor is there any merit to the court's assertion (Pet. App. 49a-51a) that the Secretary's action will substantially diminish investment in the domestic fleet. At least since the *Grace Line* decision in 1964, the shipping industry has been on notice of the potential for transferring a CDS ship to the domestic service upon repayment of its subsidy. See, *e.g.*, *Merchant Marine Miscellaneous Part 2: Hearings on Ship Mortgage Insurance H.R. 9756 Before the House*

[78] For this reason, plaintiffs arguably do not even fall within the "zone of interest" protected by Section 506 of the Merchant Marine Act. See *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970).

Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 225 (1971) (statement of James J. Reynolds, President, American Institute of Merchant Shipping). Nevertheless, as the Secretary observed in the administrative proceedings (A. 587), plaintiffs have never cited one "instance of a decision not to build new ships in the domestic trade nor any plan to build which was scrapped" as a result of that decision or the instant controversy. Given the small number of STUYVESANT-type transactions and the magnitude of other relevant factors, it is difficult to believe that that concern is of any importance to the investment decision.[79]

At base, plaintiffs seek a monopoly over the Alaskan trade—a result completely at odds with the purpose of Congress in passing the Merchant Marine Act. Indeed, Section 504 of the Act specifically precludes the Secretary from "restrict[ing] the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. 1154. See also H.R. Rep. No. 1277, *supra*, at 1; S. Rep. No. 1618, *supra*, at 10. Because neither Section 506 nor any other provision of the Act was intended to protect domestic shippers from competition by other unsubsidized vessels, the court of appeals erroneously concluded that the STUYVESANT cannot operate in the Alaskan trade.

[79] As Judge Bazelon observed (Pet. App. 59a n.16), plaintiffs' contrary contention ignores the fact that "the builder of an unsubsidized vessel has no way of knowing how many other unsubsidized vessels might be built in the future."

CONCLUSION

The judgment of the court of appeals should be vacated and remanded with instructions to dismiss plaintiffs' appeal for lack of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1979

APPENDIX

1. 28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

2. 28 U.S.C. 1292 provides in relevant part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * *
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten

days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

3. Section 101 of the Merchant Marine Act, 1936 ("the Act"), 46 U.S.C. 1101, provides:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

4. Section 207 of the Act, 46 U.S.C. 1117, provides in relevant part:

> The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *

5. Section 501 of the Act, 46 U.S.C. 1151, provides:

> (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably

calculated to carry out effectively the purposes and policy of this chapter. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of higher transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the

purposes and policy of this chapter, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this subchapter and under such further conditions and limitations as may be prescribed in the rules and regulations the Secretary of Commerce has adopted as provided in section 1114(b) of this title; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this chapter.

6. Section 502 of the Act, 46 U.S.C. 1152, provides:

> (a) If the Secretary of the Navy certifies his approval under section 1151(b) of this title, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter in-

to a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 1155 of this title with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines

that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this chapter, of building such vessel in a foreign shipyard.

(b) The amount of reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice of his intention to compute or recompute such estimated foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter

so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 1155 of this title) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less. In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in the same proportion as provided for the payments on account of the construction cost in the contract between

the shipbuilder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser, within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(d) Repealed. Pub. L. 87-877, § 2(a), Oct. 24, 1962, 76 Stat. 1200.

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or

unreasonable, and if a citizen of the United States agrees to purchase said vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction differential subsidy determined as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall at least once each year, as required for purposes of this chapter, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under this subchapter and subchapter

VII of this chapter, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this chapter, negotiate with the bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this chapter, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Com-

merce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under this subchapter, except section 1159 of this title) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this chapter. If the vessel is constructed under section 1159 of this title the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel

begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater than the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bidder, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 1125 of this title, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b) of this section, such sale to be in

accordance with all the provisions of this subchapter. Such vessel shall thereupon be eligible for an operating-differential subsidy under subchapter VI of this chapter, notwithstanding the provisions of section 1171(a)(1), and section 1180(1) of this title, or any other provision of law.

7. Section 503 of the Act, 46 U.S.C. 1153, provides:

> Upon completion of the construction of any vessel in respect to which a construction-differential subsidy is to be allowed under this subchapter and its delivery by the shipbuilder to the Secretary of Commerce, the vessel shall be documented under the laws of the United States, and concurrently therewith, or as soon thereafter as practicable, the vessel shall be delivered with a bill of sale to the purchaser with warrantly against liens, pursuant to the contract of sale between the purchaser and the Secretary of Commerce. The vessel shall remain documented under the laws of the United States for not less than twenty-five years, or so long as there remains due the United States any principal or interest on account of the purchase price, whichever is the longer period. At the time of delivery of the vessel the purchaser shall execute and deliver a first-preferred mortgage to the United States to secure payment of any sums due from the purchaser in respect to said vessel: *Provided*, That notwithstanding any other provisions of law, the payment of any sums due in respect to a passenger vessel purchased under section 1737 (b) of Appendix to title 50, reconverted or restored for normal operation in commercial services, or in respect to a passenger vessel purchased under subchapter V of this chapter, which is delivered subsequent to March 8, 1946, and which (i) is of not less than ten thousand gross tons, (ii) has a designed speed approved by the Secretary of Commerce but not less than eighteen knots, (iii) has accommodations for not less than two hundred passengers, and, (iv) is approved by the Secretary of Defense as being desirable for national defense purposes, may, with the approval of the Secretary of Commerce be secured only by a first-preferred mortgage on said vessel. With the approval of the Secretary of Commerce, such preferred mortgage may provide that the sole recourse against the purchaser of such a passenger vessel under such mortgage, and any of the notes secured thereby, shall be limited to repossession of the vessel by the United States and the assignment of insurance claims, if the purchaser shall have complied with all provisions of the mortgage other than those relating to the payment of principal and interest when due, and the obligation of the purchaser shall be satisfied and discharged by the surrender of the vessel, and all right, title, and interest therein to the United States. Such vessel upon surrender shall be (i) free and clear of all liens and encumbrances whatsoever, except the lien of the preferred mortgage, (ii) in class, and (iii) in as good order and condition, ordinary wear and tear excepted, as when acquired by the purchaser, except that any deficiencies with respect to freedom from encumbrances, condition, and class, may, to the extent covered by valid policies of insurance, be satisfied by the assignment to the

United States of claims of the purchaser under such policies of insurance. The purchaser shall also comply with all the provisions of section 868 of this title.

8. Section 504 of the Act, 46 U.S.C. 1154 provides:

> If a qualified purchaser under the terms of this subchapter desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 1152 of this title, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 1152(a) of this title or under a contract negotiated by the Secretary of Commerce as provided in section 1152(b) of this title in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 1153 of this title. The

> contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

9. Section 505 of the Act, 46 U.S.C. 1155, provides:

> All construction in respect of which a construction-differential subsidy is allowed under this subchapter shall be performed in a shipyard of the United States as the result of competitive bidding, after due advertisement, with the right reserved in the Secretary of Commerce to disapprove, any or all bids. In all such construction the shipbuilder, subcontractors, materialmen, or suppliers shall use, so far as practicable, only articles, materials, and supplies of the growth, production, or manufacture of the United States as defined in paragraph K of section 1401 of title 19; *Provided, however*, That with respect to other than major components of the hull, superstructure, and any material used in the construction thereof, (1) if the Secretary of Commerce determines that the requirements of this sentence will unreasonably delay completion of any vessel beyond its contract delivery date, and (2) if such determination includes or is accompanied by a concise explanation of the basis therefor, then the Secretary of Commerce may waive such requirements to the extent necessary to prevent such delay. No shipbuilder shall be deemed a responsible bidder unless he possesses the ability, experience, financial resources, equipment, and other qualifications necessary properly to perform the proposed contract. Each

bid submitted to the Secretary of Commerce shall be accompanied by all detailed estimates upon which it is based. The Secretary of Commerce may require that the bids of any subcontractors, or other pertinent data, accompany such bid. All such bids and data relating thereto shall be kept on file until disposed of as provided by law. For the purposes of this subchapter V, the term "shipyard of the United States" means shipyards within any of the United States and the Commonwealth of Puerto Rico.

10. Section 506 of the Act, 46 U.S.C. 1156, provides:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed dur-

> ing the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

11. Section 1104 of the Act, 46 U.S.C. 1274, provides in relevant part:

> (a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> > (1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland

lakes of the United States; (C) in foreign trade as defined in section 1244 of this title for purposes of subchapter V of this chapter; (D) in the fishing trade or industry; or (E) with respect to floating drydocks, in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1275 of this title and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter V of this chapter; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this subchapter, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

(b) Obligations guaranteed under this subchapter—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;

(2) subject to the provisions of paragraph (1) of subsection (c) of this section, shall be in an aggregate principal amount which does not exceed 75 per centum of the actual cost or depreciated actual cost, as determined by the Secretary of Commerce, of the vessel which is used as security for the guarantee of the Secretary of Commerce: *Provided, however,* That in the case of a vessel, the size and speed of which are approved by the Secretary of Commerce, and which is or would have been eligible for mortgage aid for construction under section 1159 of this title (or would have been eligible for mortgage aid under section 1159 of this title except that the vessel was built with the aid of construction-differential subsidy and said subsidy has been repaid) and in respect of which the minimum downpayment by the mortgagor required by that section would be or would have been 12½ per centum of the cost of such vessel, such obligations may be in an amount which does not exceed 87½ per centum of such actual cost or depreciated actual cost: *Provided,*

> *further*, That the obligations which relate to a barge which is constructed without the aid of construction-differential subsidy, or, if so subsidized, on which said subsidy has been repaid, may be in an aggregate principal amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost thereof; * * *

12. Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The case presents the question of the authority of the Secretary of Commerce ("Secretary") under the Merchant Marine Act, 1936, as amended, 46 U.S.C. § 1101 *et seq.* (1976) ("the Act") to amend a construction differential subsidy ("CDS") contract by deleting domestic trade restrictions in consideration for full subsidy repayment. The briefs previously filed by the petitioners and the federal parties explain that the Secretary, as the official charged with the

statute's execution, has long construed the Act to extend the disputed authority, and that Congress has knowingly affirmed that consistent departmental interpretation. Our principal briefs additionally demonstrate the reasonableness of the agency construction in light of the broad contractual authority extended the Secretary by the Act, the congressional intent behind the statute, and the fundamental purposes and policies of the Act.

The deference due a long-standing agency interpretation of its statutory powers, approved by Congress and supported by the normal aids to statutory construction, is formidable. Respondents Shell Oil Company ("Shell") and Alaska Bulk Carriers, Inc. and Trinidad Corporation (hereinafter collectively referred to as "Alaska Bulk") thus struggle to create the "compelling indications" of error necessary to reject that agency view. *See E. I. duPont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). To that end, they seek to undermine both the agency's historic interpretation of its authority and Congress' ratification of that view, to insert into the Act a prohibition that it does not and was never intended to contain, and to rewrite the Act's purposes and policies. Their efforts are unpersuasive, as we explain below.

ARGUMENT

I

Alaska Bulk's Counterstatement purports to tell the "real story" of the STUYVESANT's construction by resort to its interpretation of two isolated 1970 interagency memoranda. (Alaska Bulk Brief at 6-11.) In so doing, Alaska Bulk casts as established fact matters that were disputed and never resolved below, and that are wholly irrelevant to the legal issues before this Court. Neither the district court nor the court of appeals decided any facts relating to the agency's decision to subsidize the STUYVESANT's construction.

The two documents upon which Alaska Bulk relies were placed in the trial court record under an affidavit of its counsel that merely identified them by name and source. (App. at 387.) Those documents were revelant, if at all, to an early challenge made by the plaintiffs to the good faith of the Secretary's 1977 decision. That challenge was expressly reserved by the trial court's original decision on the cross motions for summary judgment on the grounds that "material facts remain in dispute with respect to plaintiffs' allegations concerning the pre-1977 actions of the Secretary." (Pet. App. at 90a.) Alaska Bulk is correct that the record does not set forth the full history of the early agency decisionmaking, but its suggestion that the failure is significant is astonishing. The facts and law relevant to the remaining claim were never fully presented to or resolved by the

district court because, rather than litigate the issue, Alaska Bulk (later joined by Shell) successfully moved for its dismissal before filing its appeal. (*See* App. at 558-559; Rec. Doc. 42, Mtn. for Amendment of Order and Other Relief; Transcript of Proc. of Nov. 30, 1977 at 2, 8-11.) The respondent's blatant attempt to bootstrap its tenuous legal position here, through resort to disputed facts relevant at best to a claim that it expressly abandoned below, is decidedly improper.

II

The respondents' position that the Merchant Marine Act, 1936 mandates the continuation of domestic trade restrictions on a CDS-built vessel, *even after the subsidy benefit that prompted their imposition has been returned,* is neither logically nor legally persuasive. The voluminous briefs submitted by the respondents cannot undermine the simple principles that (1) § 506 was designed only to assure fair competition between subsidized and unsubsidized vessels in the domestic trade, and (2) a vessel that has remitted its subsidy no longer poses the competitive evil that § 506 addresses. While apparently outside the grasp of the respondents, the critical distinction between a vessel that retains its subsidy and a vessel that returns its subsidy was understood and recognized by Congress and the Department of Commerce. Indeed, the significance of that distinction explains the Act's extension to the Secretary of the amendatory authority at issue in this case.

A. The Administrative Construction and Congressional Approval

The Secretary's 1977 decision to release permanently domestic trade restrictions on the STUYVESANT in exchange for full subsidy repayment comported with a reasoned, long standing and publicly-known administrative interpretation of her contractual powers under the Act. In response to Grace Line's 1964 application, the agency and the Comptroller General analyzed the statute, its history and its policy goals and found them compatible with permanent trade restriction release upon full CDS repayment. Since 1964, the agency has been on the record for the considered view that (1) § 506 poses no barrier to the challenged action, (2) full subsidy repayment creates the parity intended by the Act, and (3) the exercise of the amendatory authority is within the Secretary's discretion. (*See* Pet. Brief at 51-54; Gov't Brief at 64-66; App. at 172-180, 350-358.)

That administrative construction of the Secretary's powers under the Act had not lain dormant during the intervening years. It had instead been exercised by the Secretary on three other occasions (*id.* at 54-60; Gov't Brief at 66), brought to the attention of Congress by the industry and the Department of Commerce, and explicitly recognized and approved by Congress in the 1972 amendments to the Act (*id.* at 61-67, 72-73; Gov't Brief at 67-69). Subsequently, in amending the Act in 1978, Congress again con-

firmed the availability of unrestricted domestic trade in exchange for CDS repayment. (*See* Gov't Brief at 70-71.)

The substantial deference due this concert of administrative and congressional action has been well-established by the decisions of this Court. *See, e.g., Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain [an agency's] application of [a] statutory term, [the Court] need not find that its construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings.'

Udall v. *Tallman*, 380 U.S. 1, 16 (1965), *quoting Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction . . . [and] ratified it with positive legislation." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969). *See also Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *United States* v. *Correll*, 389 U.S. 299 (1967).

Cognizant of their burden, respondents Alaska Bulk and Shell endeavor to belittle the administrative and congressional agreement on this issue. Their quibbles with the longevity and consistency of the *Grace Line* interpretation warrant little response: The Secretary's reasoned understanding of her permanent release authority has remained unchanged, and repeatedly been reaffirmed, since the first request for its exercise in 1964. (Pet. Brief at 54-60; Gov't Brief at 65-66.) Alaska Bulk's attempt to displace the administrative interpretation of the statute by characterizing the 1977 STUYVESANT decision as an *ad hoc* and unprincipled agency response to exigent circumstances is misdirected. (Alaska Bulk Brief at 95-101.) The brief's liberal use of strong adjectives cannot alter the basic fact that the agency's studied view of the relevant authority preceded by more than a decade the STUYVESANT's request for release from trade restrictions in exchange for full subsidy repayment. The *Grace Line* decisions set forth the agency's legal view of its statutory powers;[1] the re-

[1] Alaska Bulk's argument that the *Grace Line* analysis and the government's current position are inconsistent is simply incorrect. In both contexts, the government's review of the language, history and purposes of the Act led it to the conclusion that § 506 is fully consistent with the Secretary's amendatory actions. *Grace Line* is bottomed on the legal premise that full subsidy repayment creates the parity intended by the Act and thus renders inapplicable the § 506 limitations on joint foreign and domestic trading, and temporary domestic trading, by subsidized vessels. The government's position remains unchanged.

quest that the permanent release authority be exercised in connection with the STUYVESANT mandated only a policy determination whether to exercise that discretionary authority in this case. Alaska Bulk's effort to disassociate the Secretary's 1977 STUYVESANT decision from its historic context is thus unavailing.

Neither respondent can undermine the clearly established precedent for the 1977 amendment of the STUYVESANT's contract. They therefore join in an effort to minimize the importance of Congress' subsequent acceptance of the *Grace Line* precedent. Their first line of argument, which denies the 1972 congressional ratification of *Grace Line*, is unfounded.

In 1972, Congress amended § 1104(a)(3) of the Act to make federal financing guarantees available for the repayment "of any amount of construction-differential subsidy. . . ." Pub. L. 92-507, 86 Stat. 909 (1972). The legislative history of that amendment explains that the section's reference to "any amount" includes both partial CDS repayments made under § 506 and full CDS repayment made in order to obtain permanent trade restriction release. (*See* Pet. Brief at 61-66; Gov't Brief at 67-69.) The report of the House Merchant Marine and Fisheries Committee, the relevant sections of which are set forth in full in our original brief, explains that Congress had initially contemplated extending such guarantees only for "unusual" CDS repayments like that involved in *Grace Line*, as indicated by the section proposed in

the original bill. However, in apparent response to views expressed by the Department of Commerce, Congress elected to broaden the provision "to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act." H.R. Rep. No. 688, 92d Cong., 1st Sess. 9-10, 17 (1971).

That discussion unmistakably evinces Congress' awareness of the *Grace Line* precedent. The respondents' argument that Congress' broadening of the language somehow constituted a rejection or questioning of that precedent misses the mark. Apprised of the agency's view of its statutory powers, Congress evidenced no doubt whatsoever concerning the correctness of that view. Rather, it passed legislation that not only incorporated the agency understanding but also facilitated the exercise of the very power analyzed in *Grace Line* and challenged in this case. Since the 1972 amendment, federal financing guarantees have been available to an owner who, as here, repays the government subsidy in order to obtain permanent trade restriction release. The evidence of congressional affirmation of *Grace Line* is overwhelming.[2]

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[2] Alaska Bulk's argument that other statutes enacted by Congress evince a different understanding is spurious. The brief cites two wartime statutes that authorized the domestic operation of CDS vessels under unique circumstances and *in the absence of any CDS repayment.* The Relief Act of 1940, 46 U.S.C. § 1242(a), authorized the unilateral suspension of

To avoid the persuasive weight due Congress' approval of *Grace Line*, Shell and—to a lesser extent—Alaska Bulk rely heavily upon three decisions in which this Court refused arguments that Congress had ratified a statutory construction urged by the losing parties—*Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), and *Securities and Exchange Comm'n* v. *Sloan*, 436 U.S. 103 (1978). The discussion in our principal briefs, as amplified by responsive discussion below, demonstrates the inapplicability of these three cases to the instant controversy.

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trade restrictions on CDS vessels to avoid sacrificing shipping companies that owned or operated subsidized vessels barred from foreign trade by the Neutrality Act of 1939, and to assure the maintenance of the vessels in the event they were needed for the national defense. *See* H.R. Rep. No. 2486, 76th Cong., 3d Sess. 1 (1940); S. Rep. No. 1714, 76th Cong., 3d Sess. 4 (1940). Similarly, to facilitate the sale of surplus war-built vessels and assist the post-war revitalization of the American merchant marine, the Merchant Ship Sales Act of 1946, 50 U.S.C. App. § 1742(d), *repealed*, Pub. L. 94-412, 90 Stat. 1258 (1976), authorized the government to sell a group of United States-built vessels at a price roughly equal to foreign construction cost without imposing any domestic trade restrictions on the ships, and to lift unilaterally trade restrictions to which parties who had previously purchased such war-built vessels had agreed. *See* H.R. Rep. No. 831, 79th Cong., 1st Sess. 2-3 (1945); S. Rep. No. 807, 79th Cong., 1st Sess. 1-2 (1945). The statutes thus addressed a problem totally unrelated to the Secretary's authority to release domestic trade restrictions in exchange for CDS repayment.

The relevance of the pending "Omnibus Maritime Bill" is discussed *infra* at 24-25 n.10.

In *TVA* v. *Hill*, *supra*, this Court held that Congress' continued appropriation of funds to the Tellico Dam project was insufficient to repeal by implication the "abundantly clear" prohibition of the statute's plain language and detailed legislative history. 437 U.S. at 184. The instant case, unlike *TVA* v. *Hill*, involves an agency interpretation that is consistent with the language of the Act, comports with the demonstrable intent of the enacting Congress, was explicitly approved by a congressional committee with jurisdiction over the subject matter, and served as the basis for a statutory amendment enacted by Congress.

In *International Brotherhood of Teamsters* v. *United States*, *supra*, this Court afforded "little, if any weight" to a general unfocused expression of intent by a later Congress that flatly contradicted the unambiguous intent of the enacting Congress. 431 U.S. at 354 n.39. This case, unlike *Teamsters*, presents a situation in which the expressed intent of the enacting Congress is consistent with a later Congress' approval of an interim statutory construction.

In *SEC* v. *Sloan*, *supra*, this Court found that later indications of congressional awareness and approval provided an insufficient basis to countenance an agency construction unknown to the statute's drafters that "would result in a construction of a statute which is not only at odds with the language of the section in question, and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammeled and unreviewable

power it would vest in a regulatory agency." 436 U.S. at 121. However, because this case does not present an agency construction that circumvents fundamental statutory policy or raises due process concerns, it merits the full recognition of later congressional approval that the Court withheld in *Sloan*.

B. The Language of the Act

The principal briefs filed by the petitioners and the Government explain that the broad contractual powers afforded the Secretary under the Act, and particularly by §§ 504 and 207, amply authorize her 1977 STUYVESANT decision. (Pet. Brief at 20-24; Gov't Brief at 49-51.) The respondents' counter-arguments are more puzzling than persuasive.

First, both parties suggest that § 504's proviso that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law" argues in their favor. (Shell Brief at 28-29; Alaska Bulk Brief at 93-95.) However, since no provision of the Act mandates restricting the domestic trade opportunities of a vessel that has repaid its subsidy, the quoted phrase of § 504 instead plainly supports the Secretary's decision to delete the restrictions by contract amendment. Second, both respondents dispute the relevancy of § 207 to the authority at issue here. To the extent that we understand their arguments,[3] the respondents appear

[3] We confess that Alaska Bulk's argument on this point is to us unintelligible. (Alaska Bulk Brief at 88-93.) Their brief appears to argue that (1) § 207 provides the government with contractual powers like those possessed by private corporations, (2) private corporations have no power to take governmental action, and (3) the government therefore has no power to take governmental action. In response, we point out, first, that the apparent intent of § 207 was to supplement extant governmental powers with all normative commercial powers, and, second, that a contract amendment for consideration like that at issue here would plainly fall within such corporate powers.

to contend that § 207 does not grant the Secretary powers "to protect, preserve or improve the collateral held by the Commission or Secretary to secure indebtedness" that are otherwise denied by the Act. (Shell Brief at 29-30.) We respectfully submit that that the argument begs the pivotal question in this case.

The respondents' central argument is that § 506 on its face prohibits the Secretary's challenged action. The sheer length of the respondents' briefs belies, and an analysis of § 506 disproves, the validity of that claim. No matter how the words and phrases of the section are parsed, the language of § 506 is inadequate for the task that the respondents assign to it. Certainly § 506 sets forth the contractual agreement required of the CDS recipient as a condition of the subsidy award, and circumscribes and conditions the opportunities of a subsidized vessel to engage in domestic trade. But one can study the language of § 506 in vain for any limitation upon the trading opportunities of a vessel that has remitted its subsidy to the government. Moreover, as our earlier briefs detailed, the logic of § 506 is fully consistent with

the Secretary's action: Since the trade restrictions are the *quid pro quo* for the subsidy payment, trade restriction release should naturally be the consideration for a CDS repayment. (*See* Pet. Brief at 24-29; Gov't Brief at 51-55.)

Respondents' contention that a recognition of the Secretary's repayment and release authority would nullify the restrictions of § 506 on temporary domestic trading by CDS vessels is erroneous. The argument proceeds from the assumption that the Secretary's authority to amend CDS contracts to remove trade restrictions upon CDS repayment must logically be accompanied by a power exercisable at the Secretary's discretion to reassert the trade restrictions and cancel the repayment obligation. Therefore, they conclude, the permanent release and repayment authority necessarily entails the availability of temporary, indefinite waivers at the Secretary's option, thus contravening the six month limitation on temporary waivers imposed by § 506. (Shell Brief at 24-26; Alaska Bulk Brief at 116-117.)

As Shell recognizes, the government has taken the position that it lacks authority to permit a vessel to reclaim CDS status following a repayment and release transaction. (Shell Brief at 25.) That position does not, as Shell asserts, demonstrate the "philosophical bankruptcy" of the government's position but instead the faulty premise of the respondents' argument. The authority to permit a repayment and re-

lease transaction does not, logically or necessarily, entail the authority to reverse the transaction at a subsequent date. For while the former runs afoul of no provision of § 506, a reversal of the transaction after one year or five years would—in fact if not in theory—permit a temporary transfer outside the scope of § 506. The government's position that it has the authority to permit permanent domestic trading for full CDS repayment or temporary trading in accord with § 506, but no intermediate authority to combine the two, demonstrates the compatibility of the action taken here with the provisions of § 506. The nullification argument thus presents a false issue.

Finally, the recognition of the singular focus of § 506 upon subsidized vessels, *i.e.*, vessels that retain the economic advantage of subsidized construction, exposes the weaknesses of the respondents' arguments that § 506 by implication forbids the Secretary's disputed actions. (Shell Brief at 23-27; Alaska Bulk Brief at 53-54.) The "general rule" prescribed by § 506, and the "express exceptions" contained therein, apply to a class that does not include a vessel that has remitted its subsidy. Given the extensive contractual authority otherwise granted the Secretary under the Act, the absence of any prohibition upon domestic trading by a vessel that has repaid its CDS strongly supports recognizing the amendatory authority at issue here. At the very most, the statute's failure to address the issue with specificity creates an ambiguity that makes imperative a consideration of

the Act's legislative and administrative history, and basic purposes and policies.

C. The Legislative History

There is no reasonable ground to dispute the intention of the original framers of the 1936 Act. The concept that full subsidy repayment would justify the agency's release of trade restrictions on a once-subsidized vessel remained constant from the Black Report's original outline of the construction subsidy program through the passage of the 1936 Act. While Alaska Bulk does not dispute this point (Alaska Bulk Brief at 58-61), Shell has recognized the importance of the issue and sought to contest it on two grounds here. We answer both below.

Petitioner's original brief tracked the history of the 1936 Act, cited multiple proposed bills, and quoted statements made by Senators Guffey and Black explaining the discretion of the agency to consent to permanent trade restriction release upon full sudsidy repayment. (Pet. Brief at 30-39; *see* Gov't Brief at 55-60.) Shell in response seeks to depict the comments of Senator Guffey from the floor as an isolated voice describing his peculiar understanding of his unique bill. (Shell Brief at 52-53.) The difficulty with Shell's argument is that (1) Senator Guffey's view echoed that advanced by Senator Black at the outset of the legislative process,[4] (2) the provision in

[4] *Compare* S. Rep. 898, 74th Cong., 1st Sess. 44 (1935) (Black statement) (quoted in Pet.'s Brief at 33) *with* Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Committee on Commerce, 74th Cong., 2d Sess. 133 (1936) (Guffey statement) (quoted in Pet.'s Brief at 36-37).

the Guffey bill permitting trade restriction release upon full subsidy repayment finds a counterpart in every relevant bill proposed in either House of the Congress during the legislative process,[5] and (3) the essential terms of the Guffey bill and the 1936 Act

[5] The first bills introduced in the House and Senate envisioned that the agency would have the discretion to permit a vessel's permanent operation in the domestic trade in return for the owner's secured promise to repay, over the vessel's useful life, the full unamortized subsidy with interest on unpaid installments. *See* S. 2582, 74th Cong., 1st Sess. § 504 (April 15, 1935) (introduced by Senator Copeland, Chairman of Senate Commerce Committee); H.R. 7521, 74th Cong., 1st Sess. § 504 (April 15, 1935) (introduced by Representative Bland, Chairman of House Committee on Merchant Marine and Fisheries). Subsequent amendments, and alternative proposed bills, offered some variations on the conditions of permanent trade restriction release. Some, for example, proposed that full repayment occur prior to the vessel's permanent domestic operation. *See, e.g.*, S. 4110, 74th Cong., 2d Sess. § 27 (February 24, 1936) (introduced by Senator Guffey); S. 3500, 74th Cong., 2d Sess. § 506 (Committee Print, March 3, 1936). Some, including the version first passed by the House in 1935, conditioned permanent release upon a market need for the vessel in the domestic trade. *See, e.g.*, H.R. 8555, 74th Cong., 1st Sess. § 506 (May 13, 1935); S. 3500, 74th Cong., 2d Sess. § 506 (Committee Print, March 3, 1976). Some, also including the original House version, proposed empowering the agency to revoke its consent to domestic trade at any time. *See* H.R. 8555, *supra*. However, every comprehensive bill that research has disclosed concurs on the basic availability of permanent trade restriction release upon agency consent and full subsidy repayment.

are identical.[6] Those factors demonstrate that Senator Guffey can only properly be viewed as articulating the sentiment of the enacting Congress.

Second, Shell advances the extraordinary argument that certain amendments made in the bill between its House passage in 1935 and ultimate enactment in 1936 and were intended to and did deprive the Secretary of the permanent release authority that would otherwise have been extended (Shell Brief at 40-46). This contention is easily refuted by full analysis of the materials that Shell partially cites and by reference to the 1936 Act itself.

Section 506 as enacted by the House in 1935,[7] clearly authorized a CDS-built vessel to engage permanently in exclusive domestic trade in return for full subsidy repayment. Shell mistakenly points to Section 506(c) as the source of this authority, and argues that Section 506(c) was eliminated in 1936 as a result of Congress' disapproval of permanent trade restriction release. Actually, the authority for trade restriction release upon CDS repayment was contained in Section 506(b)(1) of the 1935 Act;[8] § 506(c) merely conditioned the exercise of the power on the existence of a market need for the vessel in domestic trade. And the permanent release authority described by § 506(b)(1) of the 1935 Act survived intact the amendments to § 506 that occurred in 1936.

The House bill did create some concern in the Senate, as the portion of the Senate Commerce Committee Report quoted by Shell and cited by the petitioners indicates. (*See* Shell Brief at 44-46; Pet. Brief at 34 & n.25.) But, contrary to Shell's assertions, that concern focused not upon permanent domestic operation accompanied by full subsidy remittance, but upon the vast opportunity for joint domestic and foreign trade permitted subsidized vessels by the House version of the bill. The 1935 Act presented a vehicle for abuse—§ 506(b)(1) and (2) allowed unlimited temporary domestic trading and joint foreign and coastwise trading by a vessel that retained its subsidy and repaid only a portion for the time spent or money earned in the domestic trade. Such joint foreign and coastwise trading, which allowed the subsidized vessels to skim the cream of the domestic trading crop, was precisely the abuse that the Black Report sought to redress.

[6] The bill proposed by Senator Guffey contemplated permanent trade restriction release upon the owner's receipt of agency consent and prior repayment in full of the unamortized subsidy. *See* S. 4110, *supra* n.5. The section as enacted in 1936 envisioned permanent trade restriction release upon the owner's receipt of agency consent and prior secured agreement to repay the unamortized subsidy in full, upon terms and conditions prescribed by the agency. *See* Pub. L. No. 74-835, § 506, 49 Stat. 1999 (1936). The only significant difference between the two versions of the section is the greater discretion afforded the agency over repayment terms in the enacted § 506.

[7] H.R. 8555, 74th Cong., 1st Sess. § 506 (May 13, 1935).

[8] Shell's partial quotation of the bill excluded §§ 506(b)(1) and (2). Because we deem those subsections essential to an understanding of the changes made between the enacted House bill and final statute, we have reprinted § 506 of this bill in full in the appendix to this brief.

The nature of Congress' concern is best reflected by its actions in 1936. Section 506, as ultimately enacted, explicitly sanctioned (1) limited varieties of joint foreign and domestic trading for which proportionate repayment was required,[9] (2) permanent release of domestic trade restrictions upon agency consent and the owner's promise to repay in full the vessel's unamortized subsidy, and (3) temporary domestic trading, limited to three months in the case of an emergency, for which no CDS repayment obligation was prescribed. Pub. L. No. 74-835, 49 Stat. 1985, 1999 (1936).

Thus, the bill that emerged from the Senate and was ultimately passed in 1936 curtailed rather dramatically the permissible domestic trading by CDS vessels while the vessels retained their subsidies, but left intact the explicit description of the agency's authority to sanction a vessel's permanent operation in the domestic fleet upon full subsidy repayment. Those facts, accompanied by the abolition of the requirement of need as a condition for permanent trade restriction release, demonstrate rather vividly Congress' clear recognition of the difference between the ship that retains and the ship that remits its subsidy. Temporary domestic trading, or joint domestic and foreign trading, by a subsidized vessel poses a potential for unfair competition with unsubsidized vessels

[9] Petitioner's citation of § 506 of the 1936 Act in its principal brief inadvertently excluded the last sentence of the provision which sets forth this repayment obligation. The section has been printed in full in the appendix of this brief.

that Congress ultimately sought to redress in the Act. However, a vessel that repays its subsidy in full no longer enjoys the troublesome economic advantage and can thus fairly compete without restriction in the domestic trade. That recognition was plainly central to the consideration of this issue throughout the legislative process that culminated in the 1936 Act.

D. The 1938 Legislative History

The history of § 506 admittedly becomes confused with the 1938 amendment: At that time, the language that described the Secretary's repayment and release authority was deleted during the course of an amendment that was intended to work no fundamental change in the original purpose of the section. *See* Pub. L. No. 75-705, § 18, 52 Stat. 958 (1938). The respondents contend that the deletion of this language evinces a congressional intent to deny the Secretary the authority to release permanently domestic trade restrictions in exchange for CDS repayment. (Shell Brief at 47-50; Alaska Bulk Brief at 61-73.) The strength of the contention is sapped by two unavoidable facts. First, a congressional decision to withdraw the authority so consciously extended in 1936 would necessarily have constituted the change in the section's original purposes that Congress disavowed. *See* H.R. Rep. No. 2168, 75th Cong., 3d Sess. at 21 (1938). Second, and more important, the contemporaneous legislative history provides no indication that the authority for permanent trade restriction release was considered, much less eliminated, in 1938.

Although the available legislative history of the 1938 amendment has been much belabored by the parties to this action, several salient points merit emphasis. First, § 506 of the original Act was in no respect ambiguous on the subject of permanent trade restriction release: The final clause of the first sentence of that section explicitly sanctioned unrestricted domestic trade upon a secured agreement to make full repayment of the unamortized subsidy. Second, the glaring ambiguity of that section was its failure to mandate a proportionate CDS repayment in return for temporary domestic trade by a CDS vessel. Third, the plain thrust of the 1938 amendments to § 506—as reflected in the Kennedy remarks and the House and Senate Reports—was to assure that the statute expressly required a partial repayment for all forms of domestic trade in which a vessel that retained its subsidy might participate, thus resolving the extant ambiguity. Fourth, the history contains no mention of the perceived effect of the amendment on the power at issue here. Fifth, the unsubsidized operators who testified in 1938 showed no recognition that the amendment might afford them the permanent freedom from competition with CDS-built vessels that the respondents here seek to extract from it.

Given the clear language and history of the original § 506, which expressly sanctioned the action challenged here, it appears implausible that Congress would have acted to withdraw that authority without comment. The absence of discussion of the subject, coupled with

the expressed intent to effectuate no fundamental change, strongly indicates that Congress in 1938 simply did not focus upon the issue presented here. The vacuum of legislative intent on the subject provides no tenable basis for the conclusions urged by the respondents. The only conclusion that can fairly be drawn from this history is that Congress removed the language without disapproving the authority otherwise discernible from the current Act and supported by prior and subsequent expressions of legislative intent.

E. The Purposes and Policies of the Act

The principal briefs filed by the petitioners and the federal parties demonstrate the congruity between the Secretary's 1977 STUYVESANT decision and the Act's fundamental objectives of fortifying and maintaining an efficient national merchant marine: The Secretary's approval of the repayment and release transaction deployed needed tonnage to the Alaskan oil trade, provided employment for an otherwise unmarketable vessel, protected the government against a significant potential liability, and assisted the maintenance of a domestic shipyard. The original briefs explain additionally that the CDS repayment satisfies the fairness concerns reflected in § 506, and finally note the lack of statutory authority or factual support for the proposition that the unsubsidized owner relies by right on the absence of permanent competition with CDS-built vessels in the domestic trade. (Pet. Brief at 67-75; Gov't Brief at 71-75.)

Shell and Alaska Bulk nonetheless unabashedly assert a "right" to absolute freedom from permanent competition with any CDS-assisted vessel. According to the respondents, the predictability that evolves from that "right" is of such importance to the vitality of the American merchant marine that it is unaffected not only by CDS repayment but also by the circumstances of any industry, owner, shipyard or government investment. To accept these arguments would make predictability rather than fairness the cornerstone of the Act.

The inability to defend respondents' positions persuasively on fairness grounds may have necessitated their focus upon predicability. But that emphasis cannot obscure two basic flaws in the predictability argument. First, the suggestion that full CDS repayment is irrelevant to the Secretary's authority strains credulity. Since the source of the perceived unfairness and the catalyst for the § 506 restrictions is the subsidy benefit, the restoration of parity through CDS remittance is plainly pivotal to the statutory scheme. Second, while fairness was demonstrably the dominant congressional concern behind § 506, the respondents cite absolutely no statutory section or portion of legislative history that supports their assertedly immutable right of predictability.[10] Indeed

[10] The respondents seek to find support in the hearing remarks of the Assistant Secretary for Maritime Affairs on the proposed amendments to § 506 contained in H.R. 4769, 96th Cong., 1st Sess. (1979). (Shell Brief at 70-71; *see*

§ 506 of the Act vitiates the respondents' assertions: The routine temporary transfer of subsidized vessels to the domestic trade expressly countenanced by § 506 starkly contradicts the respondents' claims of freedom to plan without reference to the world of subsidy-assisted vessels.

Moreover, their predictions of the consequences of judicial affirmation of the Secretary's authority are not supportable. The power at issue here is not one that the Secretary has recently discovered, but one that her predecessors have claimed and exercised for fifteen years. The respondents thus do not have full freedom to speculate on the consequences. The validity of their predictions of an influx of CDS vessels

Alaska Bulk Brief at 85-87.) The import of the proposed amendment is not, as the respondents suggest, the extension of authority for permanent trade restriction release. It is instead, as the Assistant Secretary made clear in his remarks, the proposed "eliminat[ion of] the existing six month per year limitation on participation by CDS-built ships in the Jones Act trade . . . ." Statement of Samuel B. Nemirow, Hearings on Titles III, IV, and V of H.R. 4769 Before the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, 96th Cong., 1st Sess. 28-29 (September 5, 1979). The bill, if enacted, would permit temporary transfers of unlimited duration upon agency consent and in return for proportionate subsidy repayment. That change would clearly mark a dramatic departure from the express limitation on permissible periods of temporary domestic trading by subsidized vessels that § 506 has contained since 1936, and would potentially prompt the "influx" to which the Assistant Secretary referred. The respondents' suggestions that the comments addressed the permanent release of trade restrictions at issue here are simply misleading.

into the domestic trade, and a resultant depression of unsubsidized construction, must as far as possible be tested against the history of the last fifteen years.

To the extent that that history informs the consideration of these issues, it contradicts rather than affirms the respondents' contentions. The years since *Grace Line* have witnessed no massive entry of vessels constructed with CDS assistance into the domestic trade. Likewise, there is no evidence that the *Grace Line* decision prompted a discernible decrease in unsubsidized construction. Indeed, as the Secretary found in her reconsidered decision in this case, "neither a particular instance of a decision not to build new ships . . : nor any plan to build which was scrapped" has ever been cited by the respondents. (App. at 587).

Our original brief demonstrates that the Secretary's 1977 decision to accept full CDS repayment and release trade restrictions on the STUYVESANT satisfies every goal advanced by the Act, including the protection of unsubsidized vessels from unfair competition. (Pet. Brief at 67-75.) A purpose not found in the Act, but that advanced by the respondents here, is the permanent insulation of unsubsidized vessels from fair competition with other Jones Act vessels. The monopolistic efforts of the respondents should be rebuffed by this Court's affirmation of the Secretary's rightful authority.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court of appeals, and hold that the Merchant Marine Act, 1936 authorizes the Secretary of Commerce to amend a CDS contract to remove domestic trade restrictions on a vessel constructed with the assistance of a government subsidy in consideration for full CDS repayment.

Respectfully submitted,

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November 7, 1979

APPENDIX

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Section 506 of H.R. 8555, 74th Cong., 1st Sess. (as enacted by the House of Representatives on June 27, 1935):

SEC. 506. (a) Every vessel in respect of which a construction subsidy has been paid pursuant to this part shall be documented under the laws of the United States, and in case of construction, shall remain so documented under such laws for not less than twenty years from the date upon which the construction of such vessel is completed, or in case of reconditioning, for not less than the life expectancy of the vessel as determined by the Authority.

(b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided:

(1) In respect of the time such vessel shall be operated exclusively in coastwise trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel (after deducting from such subsidy the cost to the United States of the changes made pursuant to the provisions of section 501(b) as shown by the detailed estimates therefor submitted to the Auth-

ority, pursuant to the provisions of section 504(a), by the shipbuilder who constructed or reconditioned such vessel) as such time bears to the entire economic life of such vessel, together with interest at 4 per centum per annum on such portion of such amount as remains at any time unpaid and not overdue and when overdue, at the rate of 6 per centum per annum. Such amount shall be paid in periodic installments of such sums as the Authority may direct, except that the Authority shall require the whole of such amount to have been paid at the end of the economic life of such vessel.

(2) In respect of the time such vessel shall be operated in the joint coastwise and foreign trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel (after deducting from such subsidy the cost to the United States of the changes made pursuant to the provisions of section 501(b) as shown by the detailed estimates therefor submitted to the Authority, pursuant to the provisions of section 504(a), by the shipbuilder who constructed or reconditioned such vessel) as the gross revenues derived from the coastwise portions of such joint coastwise and foreign trade bear to the gross revenues derived from all portions of such joint trade.

All payments required to be made under this subsection shall be credited to the construction loan

fund, created by section 11, as amended, of the Merchant Marine Act, 1920 (U.S.C., Supp. VII, title 46, sec. 870).

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Any consent given by the Authority under this section for operation other than exclusively in foreign trade may be revoked by the Authority at any time.

Section 506 of the Merchant Marine Act, 1936, Pub. L. 74-835, c. 858, 49 Stat. 1999 (1936):

SEC. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall

agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year.

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No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1979

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. The primary issue in this case is whether the Secretary of Commerce may relieve a vessel that has received a construction-differential subsidy pursuant to Title V of the Merchant Marine Act, 1936, 46 U.S.C. 1151 *et seq.*, of the trade restrictions imposed by Section 506 of the Act, 46 U.S.C. 1156, in return for repayment in full of the subsidy.[1] Contrary to plaintiffs' contentions, nothing in the language or legislative history of Section 506

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[1]The statement of facts contained in the Brief For The Respondents Alaska Bulk Carriers, Inc. and Trinidad Corporation ("Alaska Bulk") is, to say the least, misleading. Alaska Bulk attempts to suggest that the lower court proceedings established that the transaction at issue in this case is merely the latest step in an ongoing course of misconduct by the Secretary to favor petitioners (Br. 7-15). Alaska Bulk made these same allegations in its original complaint, but rather than attempt to prove them at a trial, Alaska Bulk voluntarily dismissed that portion of its complaint (A. 558).

suggests that the Secretary is powerless to accept repayment of a subsidy in exchange for a release from Section 506 restrictions.[2] Rather, Sections 207, 501 and 504 of the Act, 46 U.S.C. 1117, 1151 and 1154, and the legislative history of the statute, including Congress' express approval of the administrative interpretation at issue in this case, make clear that Congress intended to permit the Secretary to rescind a construction-differential subsidy contract in appropriate circumstances. Plaintiffs' failure to refute this proposition is discussed in detail in petitioners' reply brief, upon which we rely.[3]

2. As we pointed out in our opening brief, this issue of statutory power is not properly before the Court, because the court of appeals lacked jurisdiction to hear this case. The district court order from which plaintiffs appealed was merely a remand order, directing the Secretary to consider expeditiously one of plaintiffs' alternative theories for relief. That order did not constitute a final decision within the purview of 28 U.S.C. 1291, and it did not conclusively determine any separate claim for relief. See Fed. R. Civ. P. 54(b); 28 U.S.C. 1292(a)(1).

Plaintiffs offer several arguments in an attempt to avoid the general rule that "under normal circumstances a remand to an [executive department] for futher proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291." *Ringsby Truck Lines, Inc.* v. *United States*, 490 F. 2d 620, 624 (10th Cir. 1973). Plaintiffs contend that the district court's November 30 order finally determined their separate "claim for relief" regarding the Secretary's power and that, even if the Secretary on remand concluded that she would not approve the STUYVESANT transaction, plaintiffs could have prosecuted an appeal on the abstract legal question of the Secretary's power. Therefore, the argument runs, the district court properly certified the question of statutory interpretation for an immediate appeal pursuant to Rule 54(b), which provides that "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * *" (see Alaska Bulk Br. 27-36; Shell Oil Br. 75-83). Alternatively, plaintiffs claim that the November 30 order finally determined their claim for injunctive relief and was accordingly appealable under 28 U.S.C. 1292(a)(1) (see Alaska Bulk Br. 43-46; Shell Oil Br. 83-86). These contentions are without merit.

The premise of plaintiffs' argument is that the abstract question of the Secretary's power under the Act is an independently viable "claim" separate and apart from the concrete question of whether the Secretary may authorize the STUYVESANT to sail in the Alaskan trade. But the case or controversy requirement of Article III precludes the federal courts from rendering advisory opinions on abstract or hypothetical questions. See, *e.g.*, *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). If the Secretary had not authorized the STUYVESANT transaction in the first instance, for reasons related to competitive injury rather than her statutory authority, plaintiffs plainly could not have

[2]A ship that has repaid the subsidy in full and therefore no longer enjoys the benefits of that subsidy is simply not "a vessel for which a construction-differential subsidy has been paid" within the meaning of Section 506, 46 U.S.C. 1156.

[3]We briefly respond to Alaska Bulk's claim that the government's citation (Govt. Br. 64 n.67) to two congressional reports relating to the 1970 amendment of the Act is "puzzling" (Br. 78). The cited reports reflect with clarity Congress' understanding that the Secretary has broad powers under Section 207 of the Act, 46 U.S.C. 1117, to settle and amend subsidy contracts. See H.R. Conf. Rep. No. 91-1555, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. 63 (1970).

alleged a concrete injury in fact sufficient to allow them to invoke the jurisdiction of the federal courts to determine the Secretary's putative powers under the Act. See, *e.g.*, *O'Shea* v. *Littleton*, 414 U.S. 488, 493-498 (1974); *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *ILU, Local 37* v. *Boyd*, 347 U.S. 222 (1954); *United Public Workers* v. *Mitchell, supra*, 330 U.S. at 86-91.[4] Similarly, if the Secretary on remand had concluded that she would not go forward with the STUYVESANT transaction, there would no longer have been a live case or controversy, and plaintiffs could not have appealed the merits of the district court's determination of the statutory issue, particularly since the Secretary has exercised this power so infrequently. See, *e.g.*, *Golden* v. *Zwickler, supra*; *Mechling Barge Lines* v. *United States*,

[4]Alaska Bulk's reliance (Br. 33-34) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is misplaced. In that case, the administrative agency had directed the various plaintiffs to change their drug labels. That order constituted a concrete controversy satisfying the requirement of Article III. Where, however, an agency has at most only asserted its power to act in a particular circumstance but is not about to act, has not yet acted or, after consideration, has declined to act, there is no ripe controversy. For example, in *Toilet Goods Ass'n* v. *Gardner, supra* (decided the same day as *Abbott Laboratories*), the Court declined to adjudicate the statutory question of the FDA's power of inspection in the absence of an attempt to inspect. So too here, there is no ripe controversy in the absence of a particular determination by the Secretary to accept repayment of a specific vessel's contruction-differential subsidy.

The decision in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), further demonstrates this point. In that case, the Court concluded that it was constitutionally permissible to address the constitutionality of the statute at issue only because the plaintiffs were in fact suffering injury as the result of the operation of the nuclear power plants. *Id.* at 72-82. Here, the question of the construction of the Act only arises if the Secretary authorizes a once-subsidized ship to repay its entire subsidy and thereafter to operate in the Alaskan trade.

368 U.S. 324, 328-330 (1961); *California* v. *San Pablo & Tulare R.R.*, 149 U.S. 308 (1893). Cf. *Poe* v. *Ullman*, 367 U.S. 497 (1961).[5]

It is thus apparent that plaintiffs have alleged no independent "claim" regarding the Secretary's statutory power. Rather, plaintiffs have asserted two interrelated theories in support of their single claim. The district court's November 30 order did not finally determine this claim; accordingly, the court's Rule 54(b) certification was incapable of creating appellate jurisdiction. See, *e.g.*, *Schexnaydre* v. *Travelers Insurance Co.*, 527 F. 2d 855 (5th Cir. 1976); *McNellis* v. *Merchants National Bank and Trust Co.*, 385 F. 2d 916 (2d Cir. 1967); *Baca Land and Cattle Co.* v. *New Mexico Timber, Inc.*, 384 F. 2d 701 (10th Cir. 1967); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2656, at 41 & § 2657, at 53 (1973); 6 *Moore's Federal Practice* para. 54.27[3], at 332-334 (2d ed. 1976). Likewise, the November 30 order did not conclusively adjudicate plaintiffs' claim for injunctive

[5]Shell Oil erroneously claims that a case or controversy would continue to exist in any event, because it would be collaterally estopped from relitigating this statutory question if the Secretary in the future were to approve a STUYVESANT-type transaction (Br. 76-79). Assuming that the Secretary declined to allow the STUYVESANT to engage in the Alaskan trade, collateral estoppel would not preclude plaintiffs from raising anew the issue of the Secretary's power if in the future the Secretary had again entered into a STUYVESANT-type transaction. The Court has made clear "that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness." *Mechling Barge Lines* v. *United States, supra*, 368 U.S. at 329; see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). In fact, if the Secretary had mooted this case on remand, plaintiffs could have avoided even the *stare decisis* effects of the district court's decision by requesting the court to vacate its decision, and, if the district court's refused, by appealing the refusal to vacate. See *id.* at 39-40.

relief. See, *e.g.*, *Cromaglass Corp.* v. *Ferm*, 500 F. 2d 601, 605-609 (3d Cir. 1974) (en banc); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F. 2d 200 (5th Cir. 1973); *Western Geophysical Co.* v. *Bolt Associates, Inc.*, 440 F. 2d 765 (2d Cir. 1971); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3924, at 80-81 (1977).[6]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated and remanded with instructions to dismiss plaintiffs' appeal for lack of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

[6]The lack of finality of the district court's order is further evidenced by Alaska Bulk's claims (Br. 107-113) regarding the nature of the subsidy repayment—an issue considered in detail by the Secretary in the course of the remand proceedings (A. 589-596). Because of plaintiffs' premature appeal, neither lower court has had an opportunity to consider this issue.

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